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IN THE

Supreme Court of the United States

WILLIAM M. VOGEL,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether California Penal Code section 647.6(a)(1) is impermissibly vague in violation of the Fourteenth Amendment because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

2. Whether collateral estoppel properly bars a criminal defendant from relitigating the validity of his arrest in a subsequent criminal action based on separate criminal offenses arising in different jurisdictions, where the subsequent suppression motion is based in part on other issues and different evidence than those presented in the first case.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court included the State of California and petitioner William M. Vogel. There are no parties to the proceedings other than those named in the petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
CALIFORNIA STATE STATUTES INVOLVED	3-4
STATEMENT OF THE CASE	5
REASONS TO GRANT THE PETITION	10
I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA PENAL CODE SECTION 647.6 IS IMPERMISSIBLY VAGUE AND THEREFORE VIOLATIVE OF THE FOURTEENTH AMENDMENT	10
A. Introduction	10
B. Decisions of the California Courts Upholding the Constitutionality of Penal Code section 647.6 Directly Contravene This Court's Precedents	11
C. Penal Code Section 647.6 is Overbroad Under the Constitutional Standard Set Forth by the Decisions of This Court	17
D. Based upon the Decisions of this Court, the Nevada Supreme Court Struck Down That State's Virtually Identical Statute	20

TABLE OF CONTENTS—Continued

Page

II. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE CALIFORNIA COURT OF APPEAL ERRONEOUSLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO PRECLUDE THE LITIGATION OF PETITIONER'S FOURTH AMENDMENT CLAIMS 22

CONCLUSION 28

APPENDICES

A. Denial of the Petition for Review in the California Supreme Court, People v. Vogel, California Supreme Court Case Number S151665, Filed June 20, 2007 ..... 1a

B. Partially Published Opinion of the Court of Appeal of the State of California, Third Appellate District, reported at People v. Vogel, 148 Cal. App. 4th 131; 55 Cal. Rptr. 3d 403 (2007), filed February 28, 2007 ..... 2a

C. Order of the Placer County Superior Court, Honorable Sandra Faithful McKeith, People v. Vogel, Placer County Superior Court Number 62-009665, Filed May 3, 2004 ..... 19a

D. Reporter's Transcript of the hearing in the Placer County Superior Court on Petitioner's Motion to Suppress the Evidence, Pursuant to California Penal Code section 1538.5, Filed April 21, 2004.. 25a

E. Unpublished Opinion of the Court of Appeal of the State of California, Third Appellate District, People v. Vogel, Court of Appeal Case Number C036488, Filed July 11, 2001 ..... 78a

TABLE OF AUTHORITIES

CASES Page

Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469 90 S. Ct. 1189 (1970)..... 27, 28
Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)..... 17, 18
City of Chicago v. Morales, 527 U.S. 41, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999)..... 11, 12, 17
City of Las Vegas v. Eighth Judicial District Court (Charles) 118 Nev. 859, 59 P.3d 477 (2002)..... 20, 21
Coates v. Cincinnati, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971)..... 11-13
Connally v. General Construction Co., 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926)..... 12
Fernandez v. Klinger, 346 F.2d 210 (9th Cir, 1965)..... 12
Grayned v. City of Rockford, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)..... 12
Hoag v. New Jersey, 356 U.S. 464, 2 L.Ed.2d 913, 919 78 S.Ct. 829, 834,(1958)..... 23
Hurley v. Irish-American Gay, Lesbian & Bisexual Group 515 U.S. 557, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995)..... 19
In re Gladys R, 1 Cal.3d 855, 83 Cal. Rptr. 671, (1970)..... 9, 10
Kolender v. Lawson, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)..... 11, 15
New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)..... 19
Papachristou v. City of Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972)..... 12
People v. Gephart, 93 Cal. App. 3d 989, 156 Cal. Rptr. 489 (1979)..... 25, 26

TABLE OF AUTHORITIES—Continued

Page

People v. Carskaddon, 49 Cal. 2d 423, 318 P 2d 4 (1957) 14

People v. Davis, 10 Cal.4th 463, 41 Cal. Rptr.2d 826 (1995) 23

People v. Kongs, 30 Cal.App.4th 1741, 37 Cal. Rptr. 327 (1994) 18, 19

People v. Lawley, 27 Cal.4th 102, 115 Cal.Rptr. 2d 614 (2002) 23

People v. Lopez, 19 Cal.4th 282, 79 Cal. Rptr. 2d 195 (1998) 11, 14

People v. Meredith, 11 Cal.App.4th 1548, 15 Cal.Rptr. 2d 285 (1992, Second App. Dist., Div. 3.) 26

People v. Pallares, 12 Cal.App.2d Supp.895, 246 P.2d 173 (1952) 9, 12

People v. Sahagun, 89 Cal.App.3d 1, 152 Cal. Rptr. 233 (1979, Fourth App.Dist., Div. 2.) 26

People v. Solomon, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973) 15

People v. Taylor, 12 Cal. 3d 686,117 Cal.Rptr. 70 (1974) 23

People v. Torres, 6 Cal.App.4th 1324, 8 Cal. Rptr. 2d 332 (1992) 26

Sealfon v. United States, 332 U.S. 575, 92 L.Ed. 180, 184,68 S.Ct. 237, 240 (1948) 23

Smith v. Goguen, 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974) 12

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 2746 (1975) 19

Spence v. Washington, 41 8 U.S.405, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974) 19

TABLE OF AUTHORITIES—Continued

	Page
Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)	16
Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)	15
United States v. Dixon, 509 U.S. 688, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993)	22
United States v. Evans, 333 U.S. 483, 92 L. Ed. 823, 68 S. Ct. 634 (1948)	21
United States v. Harriss, 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954)	12
United States v. Oppenheimer, 242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 69 (1916)	22, 23
United States v. Reese, et al., 92 U.S. 214, 23 L. Ed. 563 (1875)	21, 22
Ward v. Racism, 491 U.S. 781,105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)	19
Winters v. New York, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665 (1948)	19
STATUTES AND RULES	
CALIFORNIA PENAL CODE	
Penal Code section 647.6	3-4
Penal Code section 1538.5	4
NEVADA REVISED STATUTES	
Nevada Revised Statutes 207.260	20
UNITED STATES CODE	
28 U.S.C. section 1257(a)	2
RULES OF THE UNITED STATES SUPREME COURT	
Rule 13	2

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTION

Page

First Amendment 2
Fourth Amendment 2
Fourteenth Amendment 3

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, William M. Vogel, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Third Appellate District, filed February 28, 2007. A Petition for Review of that judgment and opinion was denied in the California Supreme Court on June 20, 2007.

OPINIONS BELOW

The order denying review in the California Supreme Court, *People v. Vogel*, case number S151665, filed on June 20, 2007, is attached hereto as Appendix A. The opinion of the California Court of Appeal, Third Appellate District, to which this petition relates, was filed on February 28, 2007, and is attached hereto as Appendix B. It is reported at *People v.*

Vogel, 148 Cal.App.4th 131, 55 Cal. Rptr.3d 403 (2007), and is a "partially published" opinion. The order of the Placer County Superior Court denying petitioner's motion to suppress is attached hereto as Appendix C. The Reporter's Transcript of the trial court hearing on petitioner's motion to suppress is attached hereto as Appendix D. The unpublished opinion of the Court of Appeal of the State of California, Third Appellate District, *People v. Vogel,* case number C036488, filed on July 11, 2001, upon which the Placer County trial court relied, is attached hereto as Exhibit E.

JURISDICTION

The order denying review by the California Supreme Court was filed on June 20, 2007. This petition is filed within 90 days of that date. Rule 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. XIV § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA STATE STATUTES INVOLVED

California Penal Code section 647.6

(a)

(1) Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

(2) Every person who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child under 18 years of age, which conduct, if directed toward a child under 18 years of age, would be a violation of this section, shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail for up to one year, or by both that fine and imprisonment.

(b) Every person who violates this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in *Section 635 of the Vehicle Code*, or the inhabited portion of any other building, shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year, and by a fine not exceeding five thousand dollars ($5,000).

(c)

(1) Every person who violates this section shall be punished upon the second and each subsequent conviction by imprisonment in the state prison.

(2) Every person who violates this section after a previous felony conviction under Section 261, 264.1, 269, 285, 286, 288a, 288.5, or 289, any of which involved a minor under 16 years of age, or a previous felony conviction under this section, a conviction under Section 288, or a felony conviction under Section 311.4 involving a minor under 14 years of age shall be punished by imprisonment in the state prison for two, four, or six years.

California Penal Code section 1538.5 (relevant portions)

(a)

(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(I) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

STATEMENT OF THE CASE

In the early evening hours of July 20, 1999, a parent phoned police to report that a man was taking photographs of children at Red Bluff High School. Patrol Sergeant Ted Wiley of the Red Bluff Police Department was dispatched to investigate. Sergeant Wiley found petitioner, who matched a description of the suspect, standing on a bluff about 10 feet above a trail near the school. Petitioner did not have a shirt on, and it appeared to Wiley that he had been changing clothes. Wiley observed a blue backpack lying nearby that was partially covered by some dry grass. Pet. App. 37-39a; 70a.

Petitioner properly identified himself and provided a date of birth. Sergeant Wiley relayed the information to dispatch, but was advised that they were unable to verify the information petitioner had provided. Petitioner told Wiley he had identification in his van. Petitioner picked up the backpack that had been lying on the ground and accompanied Wiley back to the van, which was parked in the school parking lot. Petitioner acknowledged that he had been at the school, but he told Wiley that a child had called petitioner a "molester," so he left. Wiley told petitioner there was a report of a man taking photographs of children, and petitioner asked if it was illegal to take pictures of children. Wiley acknowledged that, as far as he knew, it was *not*. *Id.* at 41-45a. After petitioner retrieved his California Driver's License, and Wiley confirmed that it was valid and matched the information earlier provided by petitioner, Wiley spoke with several of the witnesses at the school to ascertain what, if any, criminal conduct had occurred. *Id.* at 47a.

A nine-year-old boy told Wiley that petitioner had been taking pictures of two girls. According to the boy, petitioner asked one of the girls to stand in different spots for him. *Id.* at 48-49a. An 11-year-old girl told Wiley that petitioner had said he was making a parks department brochure and wanted to take pictures of her. According to the girl, petitioner wanted

her to act like she was doing a "wheelie" on her skateboard. When she was doing the "wheelie," petitioner put his hand on her stomach to push her back a bit, but she did not feel petitioner had done anything inappropriate, nor was she upset by his photographing her. Pet. App. 50-52a; 71a.

The parent who had originally contacted police told Wiley she had come to the school to check on her six-year-old daughter. Her daughter told her the man's name was "Paul." Wiley spoke with the woman's daughter, who confirmed that petitioner took photos of her on her bicycle and instructed her to put one foot on the ground and another on the pedal, but he never touched her. *Id.* at 52-53a; 71-72a.

Another police officer, Officer Mobilio, spoke with a seventeen year old boy. The boy told Mobilio he had observed petitioner put his hands down his pants, between his pants and his underwear. There was no indication that petitioner had exhibited himself to the boy, or was touching his penis during this action; nor did the boy indicate that petitioner was even looking in the boy's direction when this occurred. The boy told Mobilio that he just thought it "looked strange." *Id.* at 55-58a.

Based upon his investigation, Sgt. Wiley believed that petitioner had committed a violation of Penal Code section 647.6. *Id.* at 55a; 58a. Sergeant Wiley had dispatch conduct a records check of petitioner's criminal history, and learned that petitioner was a registered sex offender who had been previously convicted of annoying or molesting children under Penal Code section 647.6.[1] Thereafter, based upon his prior conviction of the statute, Wiley arrested petitioner for felony violation of Penal Code section 647.6.[2] Incident to peti-

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[1] All references to the Penal Code are to California State Statutes unless otherwise noted.

[2] Subsequent violations of the statute may be charged as a felony. Pen. Code § 647.6, subd. (c)(1).

tioner's arrest, Wiley conducted a search of petitioner's backpack and van where he discovered evidence of sexually provocative photographs and children's puppets which had allegedly been used in offenses committed in other jurisdictions. Pet. App. 36a.

Petitioner was not charged with any crime as a result of the picture-taking at Red Bluff high school.[3] However, as a result of the searches conducted on petitioner's van and home, he was charged in two separate cases, one in Siskiyou County, and one in Placer County. The Placer County case (case No. 62009665) was commenced in August 1999, with the filing of a complaint against petitioner for having committed seven separate offenses against two different victims (ages seven and eight) on or about July 4, 1999. *Id.* at 3a.

Petitioner was also charged with various offenses in Siskiyou County (case No. 99-1455). After the trial court in Siskiyou County denied petitioner's motion to suppress evidence, holding that Sergeant Wiley had probable cause to arrest petitioner for "annoying or molesting a minor" in violation of Penal Code section 647.6, petitioner entered a guilty plea to two counts of committing a lewd or lascivious act on a child under age 14 (Cal. Penal Code § 288, subd. (a).) and was sentenced to 15 years to life in state prison. He timely appealed. *Id.* at 3-4a.

In July 2001, the Court of Appeal, Third Appellate District, rejected petitioner's challenge on appeal to the denial of his motion to suppress, concluding "there was ample evidence to establish probable cause to arrest defendant." *Id.* at 4a; see also 78-84a.

In March 2003, following a preliminary hearing in the Placer County case, petitioner was charged by information with eight separate offenses in connection with the July, 1999

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[3] The town of Red Bluff is located in Tehama County, California.

incidents. In May 2003, petitioner filed a motion to set aside the information. He asserted all of the evidence against him stemmed from the search of his van and home incident to his arrest in Red Bluff, and that the arrest was unlawful because section 647.6 is unconstitutionally vague. The trial court denied his motion. Pet. App. 4a.

In September 2003, petitioner moved to suppress all evidence obtained as a result of his Red Bluff arrest on the grounds that (1) he was subjected to a prolonged detention that violated the Fourth Amendment; (2) his arrest was not supported by probable cause since his conduct was constitutionally protected under the First Amendment; and (3) that his arrest was unlawful because section 647.6 is unconstitutionally vague. *Id.* at 4a.

In April 2004, the trial court, the Honorable Sandra Faithfull McKeith, denied petitioner's motion. In doing so, the trial court noted the opinion of the Court of Appeal in the Siskiyou County case, and concurred with the facts and findings therein. Although the prosecution argued that petitioner was barred by the doctrine of collateral estoppel from relitigating the legality of his Red Bluff arrest, the trial court did not rule on that issue. *Id.* at 5a.

In May 2004, a new complaint was filed against petitioner in Placer County (case No. 62-43670) charging him with nine additional offenses, stemming from incidents in Shasta and Siskiyou[4] counties which granted jurisdiction to Placer County for prosecution. At the preliminary hearing, the parties stipulated, and the court ordered, that the previous motion to suppress evidence, and the resulting denial of that motion, would be deemed to apply to the new case against petitioner. The trial court subsequently granted a motion to consolidate the two cases, and in September 2004, petitioner was charged

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[4] These were different victims than the case prosecuted in that county in 1999.

by information with 17 separate offenses and various special allegations. Pet. App. 5a.

In October 2005, petitioner agreed to plead no contest to two of the charges (two counts of committing a lewd or lascivious act on a child under age 14 in violation of Penal Code section 288 (a)) and admit a special allegation of multiple victims in exchange for dismissal of the remaining 15 charges. The agreed-upon sentence was 30 years to life, to run concurrently with his sentence in the Siskiyou County case. Judgment and sentence were pronounced on December 8, 2005. *Id.* at 5a.

Petitioner timely appealed, and on February 28, 2007, the Court of Appeal, Third Appellate District, issued its opinion affirming petitioner's conviction in all respects. *Id.* at 18a. In the published portion of its opinion, the appellate court held that petitioner was barred by the doctrine of collateral estoppel from relitigating the issue of whether there was probable cause to arrest him, and thereafter conduct a search of his van and home. *Id.* at 5-12a. In the unpublished portion of its decision, the court of appeal addressed petitioner's contentions that his conduct was constitutionally protected under the First Amendment; that Penal Code section 647.6 is unconstitutionally vague; and that Sgt. Wiley's detention exceeded the permissible scope of an investigatory stop. The court found that, in its prior opinion, it had expressly rejected petitioner's assertion that his conduct was as "consistent with innocent activity as with criminal activity," and thus his First Amendment argument was based on a premise that the court had already determined to be invalid. As to the "vagueness" challenge, the court of appeal noted that a "similar" challenge to section 647.6 was rejected more than 50 years ago in a California superior court, appellate division case, *People v. Pallares*, 12 Cal.App.2d Supp. 895, 246 P. 2d 173 (1952), and that the California Supreme Court reaffirmed the statutory construction in *In re Gladys R.*, 1 Cal.3d 855, 83 Cal.

Rptr. 671, (1970) [noting that because the Legislature had amended the statute "in other respects on three occasions" since *Pallares* but had "not amended [the statute] to exclude motivation by an abnormal sexual interest or intent as an element of the offense," the court had to "presume the Legislature has acquiesced in the judicial construction"].) Finally, the court found that petitioner's contention Sgt. Wiley had no reason to detain him because petitioner had committed no crime was "just another version of his challenge to the arrest itself" and "this court rejected defendant's characterization of the facts known to Sergeant Wiley and to the extent we are once again called up to consider defendant's view of the facts, . . . we once again reject it." Pet. App. 13-18a.

REASONS TO GRANT THE PETITION

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA PENAL CODE SECTION 647.6 IS IMPERMISSIBLY VAGUE AND THEREFORE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A. Introduction

A policeman arrested petitioner because he was *suspicious* of "a middle-aged man taking photographs of kids" on a schoolyard. These children were fully clothed, they were not photographed in "sexually provocative" poses, and the photography occurred in full view of other children, as well as adults. Incident to his arrest, a search of petitioner's van and home produced sexually provocative photographs of other children, along with children's puppets which some of the child victims from other jurisdictions had described in prior reports to police. Although petitioner was never charged with a criminal offense involving the photography session, the evidence seized as a result of his arrest led to multiple charges in several jurisdictions.

Petitioner's case amply illustrates why this Court should find that Penal Code section 647.6 is impermissibly vague and therefore violative of the Fourteenth Amendment. The testimony of the arresting officer during the hearing on petitioner's motion to suppress the evidence clearly demonstrates that the statute's language not only fails to specify what conduct is proscribed, it also allows a peace officer to subjectively determine whether or not the suspect's conduct is "objectionable" and motivated by "an abnormal sexual interest in children." The judicially-created narrowing of the statue by the California Supreme Court in *People v. Lopez*, 19 Cal.4th 282, 79 Cal. Rptr. 2d 195 (1998), is insufficient to cure the statute's unconstitutional vagueness under the analysis adopted by this Court in *Coates*,[5] as well as other cases wherein such statutes have come under challenge. Indeed, other states, relying upon this Court's decisions, have struck down similar statutes. In particular, the Nevada Supreme Court relied upon this Court's decisions in *City of Chicago v. Morales*[6] and *Kolender v. Lawson*[7] to declare that state's statute unconstitutional in 2002. As discussed *infra*, the Nevada statute was virtually identical to section 647.6.

B. Decisions of the California Courts Upholding the Constitutionality of Penal Code section 647.6 Directly Contravene This Court's Precedents.

Although this Court has not heretofore specifically addressed the issue of whether California's Penal Code section 647.6 (a)(1) is impermissibly vague, this Court has consistently found that a statute which is vague, in the sense that

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[5] *Coates v. Cincinnati*, 402 U.S 611, 29 *L. Ed. 2d 214*, 91 S. Ct. 1686 (1971).

[6] *City of Chicago v. Morales*, 527 U.S. 41, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999)

[7] *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)

it sets forth no specific standard of conduct, is unconstitutional on its face because individuals of ordinary intelligence must necessarily guess at its meaning.[8] *Coates v. Cincinnati, supra*, 402 U. S. 611. Further, this Court has held impermissibly vague those statutes which allow for the policeman's unfettered discretion to apply arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).[9]

In *City of Chicago v. Morales*, *supra*, 527 U.S. 41, this Court considered a city "gang congregation" ordinance which prohibited loitering together in any public place by two or more people, of whom at least one is a "criminal street gang member." The ordinance defined "loitering" as remaining in any one place with no apparent purpose, and provided that a police officer who "observes a person whom the officer reasonably believes to be a criminal street gang member loitering in a public place with one or more persons shall order all of the persons to disperse." The ordinance provided

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[8] See e.g. *Smith v. Goguen*, 415 U.S. 566, 572-73, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972); *United States v. Harriss*, 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954); *Connally v. General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926).

[9] The United States Court of Appeals Ninth Circuit has addressed the constitutionality of California's "annoy or molest a child" statute only once since it's enactment. Penal Code section 647a, the predecessor to section 647.6, was virtually identical to the present statute, and was held to be constitutional in *People v. Pallares*, 112 Cal.App.2d Supp. 895, 246 P.2d 173 (1952). Thus, in *Fernandez v. Klinger*, 346 F.2d 210 (9th Cir. 1965) the Ninth Circuit court relied on *Pallares*, and found that the statute was "sufficiently definite to state a public offense." *Fernandez v. Klinger, supra*, 346 F.2d at p. 212. Notably, *Fernandez* was decided many years before this Court's decisions in *Coates* and *Kolender*.

that any person, regardless whether the person is a gang member, who disobeyed such a dispersal order was *guilty of a crime.* The city police department promulgated guidelines which purported to prevent arbitrary or discriminatory enforcement of the ordinance by; (1) confining arrest authority to designated officers; (2) establishing detailed criteria for defining criminal street gangs and membership in such gangs; and (3) providing for designated, but publicly undisclosed, enforcement areas. However, this Court found the ordinance to be impermissibly vague, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, because the broad sweep of the ordinance violated the requirement that a legislature establish minimal guidelines to govern law enforcement. *City of Chicago v. Morales, supra*, 527 U.S. at pp 55-56, relying on *Kolender, supra*, 461 U.S. at p. 358.

In *Coates v. Cincinnati*, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971), this Court invalidated a Cincinnati ordinance that made it a criminal offense for "'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner *annoying* to persons passing by . . . .'" *Coates v. Cincinnati, supra*, 402 U.S. at p.612 [italics added]. Although the Ohio Supreme Court had given the statute a narrowing construction by defining *annoy* to mean to "'trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate,'" this Court declined to save the statute, with Justice Stewart writing for the majority: "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'[Citation.]" *Ibid.*, at p. 612. This Court rejected the Ohio Supreme Court's deficient narrowing construction of the ordinance: ". . . the only construction put upon the ordi-

nance by the state court was its unexplained conclusion that 'the standard of conduct which it specifies is *not dependent upon each complainant's sensitivity*.' [Citation.] But the court did not indicate upon *whose* sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." *Coates, supra,* at p. 613 [italics added].

The California Supreme Court defined the elements of section 647.6 in *People v. Lopez, supra*, 19 Cal. 4th 282, thereby purportedly giving the statute a limiting construction. The *Lopez* court wrote that "the words 'annoy' and 'molest' . . . are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person." *Ibid.* at p. 289, relying on *People v. Carskaddon*, 49 Cal. 2d 423, 426, 318 P.2d 4, (1957). "The forbidden annoyance or molestation is not concerned with the child's state of mind, but rather refers to the *defendant's objectionable acts* that constitute the offense. [Citations omitted.] Accordingly, to determine whether the defendant's conduct would unhesitatingly irritate or disturb a *normal person*, we employ an objective test *not dependent on whether the child was in fact irritated or disturbed*." *People v. Lopez, supra*, 19 Cal.4th at p. 291, [italics added]. The court thus summed up the elements of Section 647.6 as requiring 1) conduct which would *unhesitatingly irritate a "normal person;"* and 2) conduct which is *motivated by an unnatural or abnormal sexual interest in children. Ibid.*, at p.291 [italics added].

Like the Ohio ordinance at issue in *Coates*, the inherent vagueness in attempting to define what "annoys, irritates, or disturbs," some hypothetical "normal person," particularly when the statute refers to "annoying or molesting a *child under the age of 18*," compels the conclusion that section 647.6 is impermissibly vague. See *Coates, supra,* 402 U.S. at p. 612. Moreover, irrespective of the purported limiting

construction in *Lopez*, it is the *policeman* who necessarily determines whether the conduct is (1) "objectionable;" and was (2) "prompted by an abnormal sexual interest in children." This unfettered discretion leads to the arbitrary and discriminatory enforcement specifically warned against by this Court in *City of Chicago v. Morales,* and *Kolender.*

In *Kolender v. Lawson, supra*, 461 U.S. 352, this Court considered California Penal Code section 647e, which required persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

The statute, as written by the legislature, provided that "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . **(e)** Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." Cal. Pen. Code § 647, subd. (e) [rpld.].

The California Court of Appeal in *People v. Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973) gave the statute a narrowing construction, defining "credible and reliable" identification as that "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Ibid.*, at p. 438. The *Solomon* court added that a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Ibid.*, at p. 438 [italics added]. Thus, under the terms of the statute, failure of the individual to provide "credible and

reliable" identification permitted the policeman to arrest any individual found walking upon the streets.

Notwithstanding the California Court's limiting construction, this Court held that the statue was unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment, because it failed to clarify what was contemplated by the requirement that a suspect provide "credible and reliable" identification, and because it vested complete discretion in the hands of the police to determine whether the suspect had satisfied the statute, and was therefore free to go in the absence of probable cause to arrest. *Kolender v. Lawson, supra*, 461 U. S. at p. 353.

That section 647.6 is vague under a *Kolender* analysis, and may "authorize, and even encourage, arbitrary and discriminatory enforcement," *City of Chicago v. Morales, supra*, 527 U.S. at p. 56, was amply demonstrated by the testimony of Sergeant Wiley during the hearing on petitioner's motion to suppress the evidence. Defense counsel asked the officer to enumerate the *specific factors* he had for believing petitioner had committed a violation of the statute, thus giving the officer probable cause to arrest him. Wiley responded: 1) Petitioner was a stranger to Red Bluff; 2) he went to a school which was not in session but there were children in the area; 3) he contacted young [mostly] girls that he didn't know, and their parents weren't around;[10] 4) petitioner wanted to take pictures of the children, and asked some of them to pose;[11] 5) petitioner told one girl that he worked for the Parks Department which wasn't true; 6) petitioner left the area when a child called him a "molester;" and 7) when he left the area, petitioner didn't go to his van, he went the opposite

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[10] The mother of at least one of the girls was present and the officer interviewed her. Pet. App. 52a.

[11] The officer's testimony revealed that none of these children were posed in a sexually provocative manner. Pet. App. 51-52a.

direction and was in an area that was "concealed."[12] Pet. App. 54-55a.

Notably, *none* of the "factors" mentioned by the sergeant constitutes criminal conduct; nor, absent the vague language of section 647.6, would support "reasonable suspicion" for the officer to believe that a crime had occurred. However, Sgt. Wiley, having benefit of the knowledge that petitioner had been previously convicted for violation of section 647.6, felt that the "totality of the circumstances"justified petitioner's arrest for violation of the statute, and the incidental search of petitioner's van and home. *Id.* at 58a.

C. Penal Code Section 647.6 is Overbroad Under the Constitutional Standard Set Forth by the Decisions of This Court.

Sergeant Wiley arrested petitioner for violation of section 647.6 based on the sergeant's *suspicions* that petitioner's conduct in taking photographs of children was "sexually motivated." During the hearing on petitioner's motion to suppress the evidence, defense counsel asked Wiley why he believed that taking photographs of a girl doing "wheelies" on her skateboard was "sexually motivated." The sergeant responded: "if a person attracted young girls, (sic) just about anything would be sexually attractive." Pet. App. 52a.

That Penal Code section 647.6 allowed Sgt. Wiley to arrest petitioner based upon Wiley's wholly subjective determination that petitioner's conduct was "*objectionable and prompted by an abnormal interest in children*" *People v. Lopez, supra*, 19 Cal. 4th at p. 291, fully supports petitioner's contention that the statute is constitutionally invalid under an overbreadth analysis. See *City of Chicago v. Morales, supra*, 527 U.S. 41, relying upon *Broadrick v. Oklahoma*, 413 U.S.

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[12] In fact, the officer testified earlier that petitioner was standing on a 10-foot high "bluff" or "grassy knoll" behind the school. Pet. App. 39a.

601, 612- 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) [The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep."].

In rejecting petitioner's claim that his conduct was constitutionally protected, the Court of Appeal, in the unpublished portion of its opinion, found that *People v. Kongs,* 30 Cal.App.4th 1741, 1749-1752, 37 Cal. Rptr. 327 (1994), specifically held that enforcement of section 647.6 *does not offend the First Amendment's guarantee of free expression.* Pet. App. 13a [italics added] But *Kongs* is wholly inapplicable to the facts at hand. There, the defendant was having young models pose in awkward or compromising positions, then deliberately aiming his camera at the models' genitalia. He was charged not only with a violation of section 647.6, but also Penal Code section 311.4(c),[13] "using a minor to pose for visual depictions of sexual conduct, " and Penal Code section 311.11(a), "possession of child pornography." Regarding section 647.6, the *Kongs* court wrote that "*Under the circumstances*, a trier of fact could reasonably conclude that Kongs' conduct in this case was motivated by an untoward sexual interest in young children. . . . A fact finder could also objectively conclude that the average person would be unhesitatingly irritated or offended by a photographer surreptitiously aiming his camera up a child's dress rather than *photographing her face or entire clothed body.* "*People v. Kongs, supra,* 30 Cal.App.4th at p. 1751 [italics added]. As

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[13] Section 311.4(c) authorizes felony charges against someone who knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 17 to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving sexual conduct by a minor under the age of 17 years alone or with other persons or animals.

explained by the *Kongs* court, the sexually explicit child photography at issue there was not of the type protected by the First Amendment. See e.g. *New York v. Ferber*, 458 U.S. 747, 756, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).

Here, Petitioner's conduct was not only objectively "innocent activity,"[14] the right of free expression and association in taking candid, nonsexual photographs of children in a public place, where they had no expectation of privacy[15] *cannot be a crime* because it is conduct protected by the First Amendment. It is now well-established that the First Amendment shields more than classic political speech. Thus, for example, this Court has extended First Amendment protection to entertainment. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* 515 U.S. 557, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995) (*Hurley*) [parades, with or without banners or written messages]; *Ward v. Racism* 491 U.S. 781,105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Southeastern Promotions, Ltd. v. Conrad* 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 2746 (1975) [music, without regard to words]; *Winters v. New York* 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665 (1948) [film].

As this Court has reminded, "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, *supra*, at p. 569. If the First Amendment reached only "expressions conveying a 'particularized message,' its protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll." *Ibid.*, quoting *Spence v. Washington* 41 8 U.S.405,411, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974).

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[14] See *Remers v. Superior Court*, 2 Cal.3d 659, 87 Cal. Rptr. 202 (1970).

[15] See *Gill v. Hearst Publishing Co.* 40 Cal.2d 224, 229-230, 253 P 2d 441 (1953.)

Here, petitioner's conduct was fully protected by the First Amendment. The photographing of fully-clothed children in non-sexual poses in a public place did not constitute a criminal offense, and Sgt. Wiley's use of section 647.6 to arrest petitioner and thereafter conduct a search of his van and home, clearly demonstrates why the statute is constitutionally invalid under this Court's prior analysis in *City of Chicago v. Morales, supra*, 527 U.S. 41 and *Kolender v. Lawson, supra*, 461 U.S. 352.

D. Based upon the Decisions of this Court, the Nevada Supreme Court Struck Down That State's Virtually Identical Statute.

In *City of Las Vegas v. Eighth Judicial District Court* (*Charles*), 118 Nev. 859, 59 P.3d 477 (2002) (*City of Las Vegas*), the Supreme Court of Nevada, relying on *City of Chicago v. Morales, supra*, 527 U.S. 41, and *Kolender v. Lawson, supra*, 461 U.S. 352, upheld a vagueness challenge to the statute that mirrored the language of section 647.6. The statute at issue was Nevada Revised Statute 207.260 which provided:

> *A person who annoys or molests a minor* is guilty of a misdemeanor. For the second and each subsequent offense he is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000. NRS 207.260 [italics added]

In *City of Las Vegas*, the conduct in question, like the conduct in the present case, did *not constitute a criminal offense*. There, the defendant was alleged to have "annoyed a minor" by following her from her residence to another residence and asking for her ten to fifteen times. The Nevada Court opined that "The language of the statute does not

specify what type of annoying behavior is prohibited, nor does it define the term "molest." By its terms, the statute is not limited only to annoyances of a sexual nature, and it provides no indication of whether the perpetrator must subjectively intend to annoy the minor, or if mere unintentional, bothersome conduct, in and of itself, is sufficient to subject an individual to criminal sanctions." *City of Las Vegas, supra*, 118 Nev. at p. 865.

Refusing the State's entreaty to adopt a limiting construction of the statute, the Nevada high court wrote: "In our system, . . . defining crimes and fixing penalties are *legislative, not judicial, functions*. Although a limiting construction is appropriate to clarify ambiguous statutory language, this court cannot apply a limiting construction to a law where the terms employed are *so vague that no standard of conduct is proscribed at all*. To construe [the Nevada statute] in a manner that would render it constitutional, this court would have to engage in judicial legislation and rewrite the statute substantially. We prefer to leave such extensive statutory revisions to the legislature." *City of Las Vegas, supra*, 118 Nev. at pp. 867-868 [italics added], citing *United States v. Evans*, 333 U.S. 483, 486, 92 L. Ed. 823, 68 S. Ct. 634 (1948), and *United States v. Reese, et al.*, 92 U.S. 214, 221, 23 L. Ed. 563 (1875) (*Reese*).

Disregarding petitioner's analysis of the underlying premise in *City of Las Vegas*, the court of appeal wrote that the primary authority he offers in support of his argument that it is the job of the Legislature, not the courts, to rewrite statutes, "is a decision by the Nevada Supreme Court in which that court apparently declined to apply a limiting construction to a statute similar to section 647.6 to save it from being unconstitutionally vague." Pet. App. 15a. But petitioner's reliance was in fact upon this Court's decisions in *United States v. Evans, supra*, 333 U.S. at p. 486, and its progeny, including *Kolender v. Lawson, supra*, 461 U.S. 352. These cases in

turn relied upon the rule expressed in *Reese*: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government." *United States v. Reese, et.al., supra,* 92 U.S. at p. 221.

California is now the only state which has ignored the precedents of this Court and continues to enforce its vague "annoy or molest a child" statute. This leads of course to the absurd result that, had petitioner been engaging in the constitutionally-protected conduct of photographing fully-clothed children in non-sexual poses in a public place, within any other state in our nation, he could not have been arrested and prosecuted for a criminal offense.

II. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE CALIFORNIA COURT OF APPEAL ERRONEOUSLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO PRECLUDE THE LITIGATION OF PETITIONER'S FOURTH AMENDMENT CLAIMS.

The decision of the court of appeal, holding that the doctrine of collateral estoppel precluded petitioner from relitigating his Fourth Amendment claims, was based upon an application of the doctrine which has no rational basis; is contrary to prior decisions of the California courts, and is fundamentally unfair.

The doctrine of collateral estoppel, as applied in criminal cases, is normally raised as a *defense* to subsequent prosecutions in violation of the Double Jeopardy Clause of the Fifth Amendment. See e.g. *U.S. v. Dixon* (1993) 509 U.S. 688, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) [and the cases cited therein]. In *United States v. Oppenheimer* 242 U.S. 85,

61 L.Ed. 161, 164, 37 S.Ct. 68, 69 (1916) this Court wrote: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." See also *Hoag v. New Jersey*, 356 U.S. 464, 2 L.Ed.2d 913, 78 S.Ct. 829, (1958) ["Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts."]; and, *Sealfon v. United States* 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 (1948).

"Collateral estoppel bars relitigation of an issue decided in a previous proceeding in a different cause of action if '(1) *the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated*; and (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.' [Citations.]" *People v. Davis* 10 Cal.4th 463, 515, 41 Cal. Rptr.2d 826 (1995) [italics added]; see also *People v. Taylor*, 12 Cal. 3d 686,117 Cal.Rptr. 70 (1974). The California Supreme Court further identified the purposes of the collateral estoppel doctrine as "promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments that undermine the integrity of the judicial system, and providing repose by preventing a *person* from being harassed by vexatious litigation. [Citation.]" *People v. Lawley*, 27 Cal.4th 102, 163, 115 Cal.Rptr. 2d 614 (2002) [italics added].

With regard to petitioner's claims, the court of appeal held that the conditions for invoking the doctrine were present, and the interests underlying the doctrine also favor its application. The court wrote: "All three of the requirements for applying the collateral estoppel doctrine are present here: (1) defendant, against whom the People assert the doctrine, was also the defendant in the Siskiyou County case; (2) that case re-

sulted in a final judgment of conviction, which was affirmed on appeal; and (3) the issue defendant seeks to litigate here-whether Sergeant Wiley had probable cause to arrest him-is identical to the issue expressly decided both by the trial court and this court in the Siskiyou County case." Pet. App. 6a.

The principal fallacy of this approach, apart from downplaying the significance of Sergeant Wiley's subsequent testimony in Placer County, and the Placer County trial court's *refusal to rely on collateral estoppel*, Pet. App. 19-24a, is that the issue of probable cause to arrest presented in the Placer County case was inextricably intertwined with petitioner's constitutional arguments, which the court of appeal purported to reject on the merits, notwithstanding the fact that these claims had never before been litigated. Thus, the probable cause to arrest issue adjudicated in the Placer County case was *not identical* to the issue decided in the Siskiyou case.

Indeed, the court of appeal acknowledged that petitioner raised issues in the Placer County case which were never raised below in the Siskiyou County case. "We acknowledge that in this case defendant has raised some issues that apparently were not decided in the Siskiyou County case: specifically, whether his arrest was invalid because he was engaged in constitutionally protected conduct or because section 647.6 is unconstitutionally vague, and whether Sergeant Wiley's detention of him prior to the arrest exceeded the permissible limits and scope of an investigative stop. The *only issue with which we are concerned at this point, however, is whether Sergeant Wiley had probable cause to arrest him for annoying or molesting a minor*, and defendant does not (and cannot) deny that that issue *was* decided in the Siskiyou County case." Pet. App. 7a [italics added].

But petitioner's arguments in the Placer County case clearly demonstrate that the suppression issue was *not*, in fact, "fully litigated" in the Siskiyou case, and the court of

appeal admitted that these issues had not been decided on appeal. Pet. App. at 7a, fn. 4. Thus the appellate court's finding that petitioner. . . "does not deny that the Siskiyou county Case was a fair adversary proceeding in which he had the opportunity to fully present his case on the question of whether Sergeant Wiley had probable cause to arrest him for annoying or molesting a minor," *Id.* at 10a, is not only an incorrect statement of the facts, it misses the point.[16]

More importantly, however, the decision of the court of appeal, in finding that petitioner was collaterally estopped from relitigating his Fourth Amendment claim, is at odds with the decisions of other districts, as well as that court's decision regarding the relitigation of suppression issues.

Most notably, in *People v. Gephart*, 93 Cal. App. 3d 989, 156 Cal. Rptr. 489 (1979) (*Gephart*) the Court of Appeal, Third Appellate District, held that the trial court in Siskiyou County was not bound by a prior determination in the Stanislaus County Superior court regarding the suppression of evidence. The court found that "the salutary legislative purpose of section 1538.5 . . . does not require its application to *subsequent prosecutions on different charges. Public policy favors full litigation of issues.*" *Ibid.* at p. 991 [italics added]. In *Gephart,* the defendants were originally arrested in Stanislaus County. At the preliminary hearing, the magistrate suppressed certain evidence but held the defendants to answer for a violation of Penal Code section 496. Thereafter, a Stanislaus County judge dismissed the action, holding that the evidence should have been suppressed.

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[16] To the extent that petitioner's former trial and appellate counsel failed to raise the constitutional issues in the underlying Siskiyou case, their representation was constitutionally ineffective under the standards set forth by this court in *Strickland v. Washington* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The defendants were subsequently accused of a robbery committed in Siskiyou County, *based upon the evidence seized in the Stanislaus County search.* After preliminary hearings, the defendants were held to answer for a violation of Penal Code section 211. The defendants then filed motions under Penal Code section 1538.5, and the preliminary hearing transcript, as well as the transcript of the Penal Code section 1538.5 hearing in Stanislaus County were exhibits at the Siskiyou hearing. The Siskiyou Superior Court ruled that the determination in the Stanislaus proceedings on the motion under Penal Code section 1538.5 *had no effect* on the Siskiyou proceedings. *People v. Gephart, supra,* at pp.992-993. Thus, the *Gephart* court held that the doctrines of res judicata and collateral estoppel were *not applicable*, and that the determination in a proceeding under Penal Code section 1538.5, is not binding on the prosecutor of a *different county* on *different charges*. *Ibid.* at p. 999.

Similarly, in *People v. Torres*, 6 Cal.App.4th 1324, 8 Cal. Rptr. 2d 332 (1992), the Court of Appeal, First Appellate District, Division Two, refused to apply the doctrine to bar the prosecution from relitigating the validity of a car search, even though the defendant had successfully moved to suppress the fruits of that search in Los Angeles County. See also *People v. Meredith*, 11 Cal.App.4th 1548, 15 Cal.Rptr. 2d 285 (1992, Second App. Dist., Div. 3.) [dismissal after suppression motion granted in federal court; defendant then charged in state court. Held: collateral estoppel did not prevent subsequent prosecution using evidence which had been suppressed in federal court]; and see *People v. Sahagun*, 89 Cal.App.3d 1, 152 Cal. Rptr. 233 (1979, Fourth App.Dist., Div. 2.) [complaint dismissed after motion to suppress was granted; proceedings were then reinstituted and prior determination that search was illegal held not binding on second trial court].

Here, the court of appeal explained that "notwithstanding the contrary suggestion in *Torres*, these factors [prosecutions on different charges, committed in different jurisdictions, based on different evidence] are simply not material in applying the collateral estoppel doctrine." Pet. App. 12a. The court further wrote that "We agree there is no rational basis for treating defendants differently from the prosecution in applying the doctrine of collateral estoppel to a motion to suppress in a criminal proceeding *as long as the prosecution and the defendants are similarly situated,* but *defendant here is not similarly situated* to the prosecution in *Gephart.* The 'paramount concern' of the *Gephart* court was 'the *unfairness to the prosecutor* in County A of preventing him from litigating a suppression issue simply because of a prior discretionary decision by the prosecutor in County B not to challenge an adverse ruling pertaining to a different charge. . . ." *Id.* at 9a. [italics added]. Thus, the court reasoned that because petitioner had appealed the adverse ruling in the Siskiyou County case, he had a "full and fair opportunity to litigate the issues," differentiating him from the prosecutor in *Gephart* who had no such opportunity. *Id.* at 10a.

The practical effect of the court's reasoning of course is that petitioner was barred from imposing a valid procedural defense to different charges, based on different acts, in a different jurisdiction, than the one in which the original motion to suppress was denied. Thus, even assuming that the threshold requirements to invoke the doctrine of collateral estoppel were met here, the interests of court efficiency and finality are insufficient to support application of the doctrine given the fundamentally unfair result in denying petitioner the right to fully litigate his claims.

As this Court held in *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469 90 S. Ct. 1189 (1970), "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic

approach of a 19th century pleading book, but with *realism and rationality*." *Ashe v. Swenson, supra*, 397 U.S. at p. 444.

The facts and circumstances present here do not support the decision of the court of appeal that petitioner was collaterally estopped from relitigating the lawfulness of his arrest since he never fully litigated those claims in the Siskiyou County case. It cannot be that the Due Process Clause stands to *ensure fairness to the government* in its pursuit of prosecuting criminal offenses, while at the same time denying a criminal defendant the right to fully exhaust his constitutional claims. This was clearly not the intent of the Framers, nor has it ever been so interpreted by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc
Court of Appeal
Third Appellate District

[Filed JUN. 20, 2007]

No. C051861
S151665

THE PEOPLE,
Plaintiff and Respondent,

v.

WILLIAM MICHAEL VOGEL,
Defendant and Appellant.

The petition for review is denied.

/s/ George
Chief Justice

APPENDIX B

CERTIFIED FOR PARTIAL PUBLICATION *

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

[Filed 2/28/07]

C051861
(Super. Ct. No. 62009665)

THE PEOPLE,
Plaintiff and Respondent,

v.

WILLIAM MICHAEL VOGEL,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Placer County, Sandra Faithfull McKeith, Judge. (Retired Judge of Santa Clara Sup. Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Rosenfeld & Saria, Robert J. Saria and Kenneth L. Rosenfeld, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Virna L. Depaul, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, and IV of the Discussion.

After he was arrested in Red Bluff in 1999 for annoying or molesting a minor (Pen. Code,[1] § 647.6), defendant William Michael Vogel was prosecuted on different charges in Siskiyou and Placer Counties based on evidence obtained as a result of that arrest. In each case, the trial courts denied his motion to suppress evidence. In the Siskiyou County case, we affirmed that ruling on appeal. *(People v. Vogel* (July 11, 2001, C036488) [nonpub. opn.].) Defendant now challenges the ruling in the Placer County case.

As will be seen, we conclude defendant is barred by the doctrine of collateral estoppel from relitigating in this case the issue decided in the prior case—whether probable cause existed for defendant's arrest. As for the remaining arguments defendant raises here, we find no merit in them. Accordingly, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 20, 1999, Patrol Sergeant Ted Wiley of the Red Bluff Police Department arrested defendant for annoying or molesting a minor after investigating a report that defendant was trying to take pictures of children at Red Bluff High School.[2] Based on evidence obtained as a result of the arrest, defendant was charged with offenses in two separate cases, one in Siskiyou County and one in Placer County. The Placer County case (case No. 62-009665) was commenced in August 1999 with the filing of a complaint against defendant for having committed seven different crimes against two different victims (ages seven and eight) on or about July 4, 1999.

Meanwhile, defendant was also charged with various crimes in Siskiyou County (case No. 99-1455). After the trial court in

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Section 647.6 makes it a crime to "annoy[] or molest[] any child under 18 years of age." (§ 647.6, subd. (a).)

Siskiyou County denied a motion to suppress evidence, ruling the arresting officer had probable cause to arrest defendant for annoying or molesting a minor, defendant pled guilty to two counts of committing a lewd or lascivious act on a child under age 14 and was sentenced to 15 years to life in prison. In July 2001, this court rejected defendant's challenge on appeal to the denial of his motion to suppress, concluding "there was ample evidence to establish probable cause to arrest defendant." The California Supreme Court denied defendant's petition for review. *(People v. Vogel*, review den. Sept. 19, 2001, S099940.)

In March 2003, following a preliminary hearing in this case, defendant was charged by information with eight crimes in connection with the incidents in Placer County in July 1999. In May 2003, defendant filed a motion to set aside the information. He asserted all of the evidence against him, both in this case and in the Siskiyou County case, stemmed from his arrest in Red Bluff in July 1999, and that that arrest was "illegal" because section 647.6 is "unconstitutional and void." As a result, defendant argued, the court should set aside the information in this case and set aside and expunge the judgment against him in the Siskiyou County case. The trial court (Judge Couzens) denied his motion.

In September 2003, defendant moved to suppress all evidence obtained as a result of his arrest on July 20, 1999, on the grounds he was subjected to a prolonged detention that violated the Fourth Amendment, his arrest was not supported by probable cause, and his arrest violated his First Amendment rights. Defendant also asserted again that his arrest was invalid because section 647.6 is unconstitutionally vague.

In opposing the motion to suppress, the prosecutor called the trial court's attention to this court's ruling on defendant's appeal in the Siskiyou County case and argued that the motion to suppress should be denied "on collateral estoppel

grounds." The prosecutor also opposed the motion on the merits.

In April 2004, the trial court (Judge McKeith) denied the motion. In doing so, the trial court noted this court's opinion in the Siskiyou County case and "concur[red] with the facts and findings in that opinion," but did not mention collateral estoppel or indicate that the court felt itself bound by the prior decision on appeal.

In May 2004, a new complaint was filed against defendant in Placer County (case No. 62-43670) charging him with nine offenses. At the preliminary hearing, the parties stipulated, and the court ordered, that the previous motion to suppress evidence, and the resulting denial of that motion, would be deemed to apply to the new case against defendant.

The trial court subsequently granted a motion to consolidate the two cases, and in September 2004 defendant was charged by consolidated information with 17 offenses and various special allegations.

In October 2005, defendant agreed to plead no contest to two of the charges (two counts of committing a lewd or lascivious act on a child under age 14) and admit a special allegation of multiple victims in exchange for dismissal of the remaining 15 charges and a sentence of 30 years to life, to run concurrently with his sentence in the Siskiyou County case. Defendant filed a timely notice of appeal.

DISCUSSION

I

Collateral Estoppel

Defendant's first argument on appeal is that Sergeant Wiley did not have probable cause to arrest him for annoying or molesting a minor. The People contend this argument "is barred by the doctrine[] of collateral estoppel" because defendant "fully litigated the probable cause issue in [the] Siskiyou

County" case. For the reasons that follow, we agree that defendant is collaterally estopped from relitigating whether Sergeant Wiley had probable cause to arrest him.[3]

"Collateral estoppel has been held to bar relitigation of an issue decided at a previous trial if (1) the issue necessarily decided at the previous trial is identical to the one which is sought to be relitigated; if (2) the previous trial resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior trial." *(People v. Taylor* (1974) 12 Cal.3d 686, 691, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) Application of the collateral estoppel doctrine serves: "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. [Citation.] In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case." *(Taylor*, at p. 695.)

All three of the requirements for applying the collateral estoppel doctrine are present here: (1) defendant, against whom the People assert the doctrine, was also the defendant in the Siskiyou County case; (2) that case resulted in a final judgment of conviction, which was affirmed on appeal; and (3) the issue defendant seeks to litigate here—whether Sergeant Wiley had probable cause to arrest him—is identical to the issue expressly decided both by the trial court and this court in the Siskiyou County case.

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[3] Because we conclude collateral estoppel applies, we need not reach the People's alternate argument that relitigation of this issue is barred by the doctrine of law of the case.

Defendant contends collateral estoppel should not apply here because "the issues raised in the present case differ from those raised in the previous matter." We acknowledge that in this case defendant has raised *some* issues that apparently were not decided in the Siskiyou County case: specifically, whether his arrest was invalid because he was engaged in constitutionally protected conduct or because section 647.6 is unconstitutionally vague, and whether Sergeant Wiley's detention of him prior to the arrest exceeded the permissible limits and scope of an investigative stop.[4] The only issue with which we are concerned at this point, however, is whether Sergeant Wiley had probable cause to arrest him for annoying or molesting a minor, and defendant does not (and cannot) deny that that issue *was* decided in the Siskiyou County case.

Consequently, it is defendant's position that this court should revisit the question of whether there was probable cause for his arrest and reach a different conclusion than the court reached six years ago in the Siskiyou County case. Relying on two cases in which the appellate courts declined to apply the collateral estoppel doctrine to rulings on motions to suppress evidence—*People v. Gephart* (1979) 93 Cal. App.3d 989 and *People v. Torres* (1992) 6 Cal.App.4th 1324—defendant argues the doctrine should not apply here because: "[t]he charges here are not the same as those in the [Siskiyou County] case" and "the evidence used to convict [defendant] in this case is not the same as in the Siskiyou case." As we will explain, however, those factors are irrelevant to whether we should apply the collateral estoppel doctrine, and the decisions in *Gephart* and *Torres* declining to apply that doctrine do not support a similar result here.

In *Gephart*, three defendants were arrested in Stanislaus County and charged with unknown offenses. *(People v.*

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[4] We know those issues were not resolved in this court's opinion in the Siskiyou County case, and the People have offered no evidence they were decided by the trial court in that case.

Gephart, supra, 93 Cal.App.3d at pp. 991-992 & fn. 2.) After the magistrate suppressed certain evidence but held the defendants to answer on a charge of receiving stolen property, the superior court granted their motion to suppress "all of the evidence seized" (presumably as a result of their arrests) and "thereafter dismissed the action pursuant to Penal Code section 995." *(Id.* at pp. 992-993.) The prosecutor did not seek appellate review of the trial court's ruling. *(Id.* at p. 996, fn. 3.)

The defendants were later charged with armed robbery in Siskiyou County. *(People v. Gephart, supra*, 93 Cal.App.3d at p. 993.) They moved to suppress the evidence against them (which included evidence seized as a result of the arrests in Stanislaus County), and the Siskiyou County Superior Court ruled "that the determination [on the suppression motion] in the Stanislaus proceedings . . . had no effect on the Siskiyou proceedings." (*Id.* at p. 993.) The court then granted suppression "as to evidence which was seized from [the] defendants' vehicle, but denied the motion as to other evidence," includeing a gun seized from one of the defendants on his arrest. (*Id.* at p. 994.) A jury ultimately found the defendants guilty based on evidence that included the gun. (*Id.* at p. 993.)

On appeal to this court, the defendants contended the Siskiyou court erred in not giving preclusive effect to the ruling of the Stanislaus court because "the ruling of a superior court on the admissibility of evidence in a Penal Code section 1538.5 motion acts either as res judicata or as collateral estoppel." (*People v. Gephart, supra*, 93 Cal.App.3d at p. 995.) Based on the facts before it, this court disagreed, holding that "the determination in a special proceeding under Penal Code section 1538.5 is not binding on the prosecutor of a different county on different charges." (*Id.* at p. 999.) In explaining the "[s]ound policy reasons support[ing its] determination," the court pointed out that "[a]fter the granting of a motion under Penal Code section 1538.5, the prosecutor may decline to

proceed further for reasons quite independent of the legality of the search or seizure." (*People v. Gephart, supra*, 93 Cal.App.3d at pp. 999, 1000.) The court explained that giving preclusive effect to the superior court's determination in such a case "would . . . prevent full and fair litigation of the [search and seizure] issue by the prosecutor in [a different county] in a proceeding on charges distinct from the charges against the defendants in [the first county]. Such an effect would defeat one of the major purposes of the enactment of Penal Code section 1538.5, that of providing the prosecution with full appellate rights on the issues of the legality of the search and seizure." (*Id.* at p. 1000.)

Relying on *Gephart*, defendant contends that if the prosecution is not bound by a ruling on a suppression motion in another county, then the same rule must apply to defendants like him. We agree there is no rational basis for treating defendants differently from the prosecution in applying the doctrine of collateral estoppel to a motion to suppress in a criminal proceeding, as long as the prosecution and the defendants are similarly situated, but defendant here is not similarly situated to the prosecution in *Gephart*. The "paramount concern" of the *Gephart* court was "the unfairness to the prosecutor in County A of preventing him from litigating a suppression issue simply because of a prior discretionary decision by the prosecutor in County B not to challenge an adverse ruling pertaining to a different charge, especially when the decision in County B may have had little or nothing to do with the merits of the ruling." (*People v. Torres, supra*, 6 Cal.App.4th at p. 1331.) In other words, the *Gephart* court was driven by the fact that the search and seizure issue may not have been fully and fairly litigated in the Stanislaus County proceeding because the superior court's ruling on that issue was not challenged on appeal, and there was no way of knowing whether the prosecution's decision not to challenge

that ruling had anything to do with its merits.[5] Thus, the *Gephart* court balanced the need to limit relitigation of the suppression issue against the right of a fair adversary proceeding in which the People could fully present their case on that issue and found the balance weighed in favor of the People.

The circumstances of this case, however, justify a different result. Defendant does not deny that the Siskiyou County case was a fair adversary proceeding in which he had the opportunity to fully present his case on the question of whether Sergeant Wiley had probable cause to arrest him for annoying or molesting a minor. Moreover, not only did defendant get a full and fair chance to litigate that issue before the superior court, he got a full and fair chance to litigate the issue before this court. Thus, there is no need to allow defendant to relitigate the issue in this case to vindicate his right to a fair adversary proceeding in which he can fully present his case on the probable cause issue. Defendant has had that opportunity already. Under these circumstances, the need to limit litigation must prevail. This result promotes judicial economy, prevents the possibility of an inconsistent determination that would undermine the integrity of the judicial system, and provides repose to the People.

Nothing in *Torres*, the other case on which defendant relies, undermines our conclusion. In *Torres*, a two-member majority of the appellate panel reached a similar result to that in *Gephart*. (*People v. Torres, supra*, 6 Cal.App.4th at pp. 1329-1335.) In doing so, the majority distinguished another decision—*People v. Zimmerman* (1979) 100 Cal.App.3d 673—on

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[5] On this point, it is worth noting that the *Gephart* court disposed of the defendants' challenge to the Siskiyou County court's denial of their motion to suppress on the merits in a single sentence in a footnote, concluding that "[t]he pistol was seized during a proper pat-down search pursuant to a lawful investigative stop." (*People v. Gephart, supra*, 93 Cal.App.3d at p. 992, fn. 1.)

the ground that *Zimmerman* involved "the precise charges which were dismissed in the prior criminal action," while *Torres* "involved different offenses committed in different jurisdictions and based on different evidence." (*Torres*, at p. 1331.)

Seizing on this language, defendant contends the collateral estoppel doctrine should not apply here because, like *Torres* (and unlike *Zimmerman*), this case involves prosecutions on different charges committed in different jurisdictions based on different evidence. A brief look at *Zimmerman*, however, reveals why the language from *Torres* on which defendant relies has no bearing on whether collateral estoppel should apply here.

In *Zimmerman*, the defendant, who was on probation in a case out of Contra Costa County, was charged with gun and drug offenses in Santa Clara County after a search of his person following an investigatory detention revealed a pistol and three cubes of LSD. (*People v. Zimmerman, supra*, 100 Cal.App.3d at pp. 674-675.) The charges were later dismissed after his motion to suppress the evidence was granted at a preliminary hearing. (*Id.* at p. 675.)

Meanwhile, a petition to modify or revoke the defendant's probation in the Contra Costa County case was filed based on his possession of the gun and the LSD. (*People v. Zimmerman, supra*, 100 Cal.App.3d at p. 675.) The trial court denied the defendant's motion to exclude the evidence and found him in violation of his probation. (*Ibid.*) On appeal, the appellate court concluded that the trial court in the probation revocation proceeding "could not consider the evidence that had been suppressed at the preliminary hearing in Santa Clara County" because subdivision (d) of section 1538.5 precludes the use of illegally seized evidence "'at any trial or other hearing.'"[6] (*Zimmerman*, at pp. 675-676.)

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[6] In contrast to the *Zimmerman* court, the *Gephart* court implicitly rejected this construction of subdivision (d) of section 1538.5 when, after

For our purposes, what is most apparent from *Zimmerman* is that *it did not involve the collateral estoppel doctrine*; instead, it strictly involved the application of a statutory bar to the further use of suppressed evidence. Thus, to the extent the defendants in *Torres* relied on *Zimmerman* to support their collateral estoppel argument, the *Torres* majority could have distinguished *Zimmerman* on that basis alone.

With this understanding of the basis for the decision in *Zimmerman*, there is no rational basis for defendant's assertion that the collateral estoppel doctrine should not apply here because, like *Torres*, this case involves prosecutions on different charges committed in different jurisdictions based on different evidence. Notwithstanding the contrary suggestion in *Torres*, these factors are simply not material in applying the collateral estoppel doctrine. As long as (1) the search and seizure issue involved in both cases is the same, (2) that issue was necessarily decided in the earlier case, (3) the earlier case was resolved by a final judgment, (4) the same person was the defendant in both cases, and (5) that person had a full and fair opportunity to litigate that issue in the earlier case, then we perceive no rational basis for refusing to give preclusive effect to the judicial determination of that issue in the earlier case.

Since this case meets the foregoing criteria, we conclude collateral estoppel bars defendant from relitigating in this case whether Sergeant Wiley had probable cause to arrest him. Accordingly, we will not consider that issue further.

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noting that the defendants in that case were relying on that statute in addition to "the doctrines of res judicata and collateral estoppel," the court expressed its disbelief "that the Legislature intended to give the determination [on a suppression motion] conclusive effect beyond the proceedings in which the defendant is involved at the time of the determination." (*People v. Gephart, supra*, 93 Cal.App.3d at pp. 997, 999.)

II

First Amendment

Defendant next suggests that his arrest was invalid because his conduct—which he characterizes as simply "taking pictures of children"—was "protected by the First Amendment." According to him, "For all Sgt. Wiley knew, [defendant] was merely exercising his right to artistic freedom . . . ."

This argument is little more than a variation on defendant's argument that Sergeant Wiley lacked probable cause to believe he was engaged in criminal conduct—an argument this court rejected six years ago in the Siskiyou County case and that we have concluded defendant is collaterally estopped from relitigating here. In essence, defendant's assertion is that not only was his conduct consistent with innocent activity,[7] it was constitutionally protected. In the prior appeal, however, this court expressly "reject[ed] defendant's assertion that his conduct was as consistent with innocent activity as with criminal activity." Thus, defendant's First Amendment argument is based on a premise that has already been determined to be invalid. For that reason, the argument is without merit. (See *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749-1752 [enforcement of section 647.6 does not offend the First Amendment's guarantee of free expression].)

III

Vagueness

Defendant next contends his arrest was invalid because section 647.6 is unconstitutionally vague and therefore void. We disagree.

"The constitutional guarantees of due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) require 'a rea-

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[7] "[A]n arrest and search based on events as consistent with innocent activity as with criminal activity are unlawful." (*Remers v. Superior Court* (1970) 2 Cal.3d 659, 664.)

sonable degree of certainty in legislation, especially in the criminal law . . . .' [Citation.] '[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *(People v. Ewing* (1999) 76 Cal.App.4th 199, 206.)

A similar challenge to section 647.6 was rejected more than 50 years ago in *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895.[8] There, in addressing an argument that the statute was not "sufficiently clear and definite to state a public offense," the court concluded that "the meaning of the words 'to annoy or molest,' as employed in the code section, are sufficiently definite and certain to advise the public generally what acts and conduct are prohibited." (*Id.* at pp. 901, 902.) The court went on to explain that "[w]hen the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children. It should be noted further that the section must be construed reasonably as setting up an objective test for annoyance or molestation; a childish and wholly unreasonable subjective annoyance, arising, for example, from a child's dislike for proper correction by a teacher, is not covered by the section. The annoyance or molestation which is forbidden is in no sense a purely subjective state on the part of the child. The

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[8] *Pallares* actually involved former section 647a, subdivision (1), but that statute was the precursor to section 647.6 and the operative language in the two statutes is the same.

objectionable acts of a defendant constitute the annoyance or molestation contemplated by the statute." (*Id.* at pp. 901-902.)

Eighteen years later, in *In re Gladys R.* (1970) 1 Cal.3d 855, the California Supreme Court expressly "reaffirm[ed] the construction given [the statute] in *Pallares* and subsequent cases." (*In re Gladys R.*, at p. 868.)

Defendant suggests that in analyzing the statute for vagueness, we must disregard the judicial construction of the statute "[o]ver the years" and focus instead solely on the words of the statute as originally written because it is the job of the Legislature, not the courts, to rewrite statutes. The primary authority he offers in support of this argument is a decision by the Nevada Supreme Court in which that court apparently declined to apply a limiting construction to a statute similar to section 647.6 to save it from being unconstitutionally vague. (*City of Las Vegas v. Dist. Ct.* (Nev. 2002) 59 P.3d 477.)

That the Nevada Supreme Court chose not to give a similar statute a limiting construction does not mean we are required to, or that we even can, ignore the judicial construction that has been given to section 647.6 for more than half a century. Because the Legislature has amended the statute numerous times in the years that have passed since *Pallares* and *Gladys R.* and has never repudiated the construction the courts have given the statute, the Legislature has presumably adopted the judicial construction of the statute as its own. (See *In re Gladys R., supra*, 1 Cal.3d at pp. 868-869 [noting that because the Legislature had amended the statute "in other respects on three occasions" since *Pallares* but had "not amended [the statute] to exclude motivation by an abnormal sexual interest or intent as an element of the offense," the court had to "presume the Legislature has acquiesced in the judicial construction"].) In any event, we are bound by the construction of the statute adopted by our Supreme Court in *In re Gladys R.* (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we are bound to con-

clude that defendant's challenge to section 647.6 for vagueness fails.

IV

Investigative Stop

Defendant's final argument appears to be that regardless of whether Sergeant Wiley ultimately had probable cause to arrest him, Sergeant Wiley's detention of him prior to that arrest exceeded the permissible limits and scope of an investigatory stop in various respects. We disagree.

At the hearing on the motion to suppress evidence in this case, Sergeant Wiley testified that after he contacted defendant, and "dispatch" could not find "a driver's license or ID match" on the name and birth date defendant had given him, he told defendant that defendant "was not going to leave until [Wiley] was able to identify him."

Defendant suggests that at this point (which we will call the original detention), Sergeant Wiley did not have the *reasonable* suspicion of criminal activity necessary to justify an investigative stop. His argument is not persuasive.

"[A] police officer may conduct a limited investigative detention of a person he reasonably suspects is involved in criminal activity . . . . In order to justify the detention, the officer must be able to articulate specific facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. [Citation.] The officer's suspicion must be subjectively entertained by him and it must be objectively reasonable for him to do so based on the reasonable beliefs of a similarly trained and experienced officer." (*People v. Snyder* (1992) 11 Cal.App.4th 389, 392.)

In arguing that Sergeant Wiley did not have a reasonable suspicion of criminal activity at the time of the original detention, defendant presents an incomplete picture of the

facts known to Sergeant Wiley at that time. Essentially, he contends that all Sergeant Wiley knew was there had been "a report of 'someone taking photographs of children'" and that "Red Bluff Police Department's dispatcher was unable to match [defendant's] information with anything in the Department of Motor Vehicles[']] system." This court's opinion in the Siskiyou County case, however, reveals that Sergeant Wiley knew much more than that. In that opinion, the court summarized the pertinent facts as follows:

> "In the early evening of July 20, 1999, a parent phoned police to report that a man had been trying to take pictures of children at Red Bluff High School and their parents were chasing him away. Patrol Sergeant Ted Wiley of the Red Bluff Police Department was dispatched to investigate.
>
> "Officer Wiley found defendant, who matched a description of the suspect, standing on a bluff about 10 feet above a trail near the school. Defendant did not have a shirt on, and it appeared to Wiley that he had been changing clothes. Wiley observed a blue backpack lying nearby that was partially concealed by some dry grass placed on top of it.
>
> "Defendant identified himself and provided a date of birth, and Wiley relayed the information to dispatch. Defendant acknowledged that he had been at the school, but he told Wiley that some kids had called him a molester so he had left. Wiley told defendant there was a report of a man taking pictures of children, and defendant responded that he did not want to say anything incriminating and asked if it was illegal to take pictures of children."

Defendant does not account for any of these additional facts in his argument that the original detention was not supported by reasonable suspicion. Accordingly, his argument lacks any persuasive force.

The same is true of the remainder of defendant's argument. He suggests that regardless of whether the original detention was justified, his *continued* detention from that time until the time of his formal arrest was *not* justified because the investigation that Sergeant Wiley conducted during that time "turned up no criminal activity whatsoever." (Bolding omitted.) But in making that argument, defendant fails to account for all of the pertinent facts Sergeant Wiley uncovered, which are detailed in this court's prior opinion. To the extent defendant does discuss Sergeant Wiley's investigation in the statement of facts in his brief, he shades all of the facts in his favor, rather than viewing them (as we must) in a manner consistent with how they reasonably could be viewed by a police officer with training and experience similar to Sergeant Wiley. (See *People v. Snyder, supra*, 11 Cal.App.4th at p. 392.)

In the end, defendant's challenge to the detention preceding his arrest is just another version of his challenge to the arrest itself—he was not doing anything that could vaguely be construed as criminal and therefore Sergeant Wiley had no basis for detaining him, let alone arresting him. More than six years ago, however, this court rejected defendant's characterization of the facts known to Sergeant Wiley, and to the extent we are once again called upon to consider defendant's view of the facts (this time in a challenge to the detention preceding his arrest), we once again reject it. Accordingly, like before, we find no error in the trial court's denial of his motion to suppress evidence.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

HULL, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLACER

[Filed MAY 3, 2004]

Case No.: No. 62-009665
RULING ON MOTION TO DISMISS PC 1538.5

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

WILLIAM MICHAEL VOGEL,
Defendant.

PROCEDURAL BACKGROUND

This matter came on for hearing on January 7, 2004 in Department 3, the Honorable Sandra McKeith presiding. The Motion was filed by defendant pursuant to Penal Code Sec. 1538.5. Deputy District Attorney David Broady represented the People of the State of California. The defendant William Vogel was present and represented by Daniel A. Horowitz, Esq.

Counsel agreed that the hearing was set for the primary purpose of receiving testimony from the Red Bluff Police Officer who made the initial contact with defendant. This contact and subsequent arrest led to defendant's conviction in Siskiyou Co. Case no. 99-1453. A 1538.5 Motion was filed in that case and was heard concurrently with the preliminary hearing on March 17, 2000. The Motion was denied and later renewed and denied in the Superior Court on June 28, 2000. An appeal to the Third Appellate District (Case No. CO36488) followed the denial of the motion and in an

unpublished opinion on July 11, 2001 the Third District Court upheld the denial by the Superior Court.

The defendant brings the motion in this case since the arrest on the Placer Co. charges resulted from a search incident to his initial arrest in Siskiyou Co.

The parties agreed at the time of the hearing in January that the court should consider the moving, opposing and reply papers, hear the testimony of Sgt. Wiley of the Red Bluff Police Department, review the documents which were marked as Exhibits 1 through 4 and take the matter under submission. Exhibit 1 is Red Bluff Operational Directive 3-19; Exhibit 2 is the July 11, 2001 Opinion of the Third Appellate Court; Exhibit 3 is the Preliminary Hearing Transcript in Siskiyou Co. Case. No. 99-1453 on April 26 and 27, 2000; Exhibit 4 is a portion of the Red Bluff Police Dispatch Log for July 20, 1999.

At the conclusion of the hearing on January 7 the Court granted defense counsel's request to submit a supplemental brief by January 30 and required the People's response by February 18, 2004. To date nothing has been filed by defense counsel. The People filed a supplemental informational brief on February 5, limited to calling the Court's attention to the recently decided Ninth Circuit case, *U.S. v. Christian*, (2004) 356F3d 1103, dealing with an identification issue. In response to the Court's request, defense counsel orally advised the clerk that he believed this case should remain under submission until the U.S. Supreme Court issues a decision in Case No. 03-5554, *Hiibel v. State of Nevada*. Defendant's counsel has never submitted a written request or filed any supplemental brief. Therefore, the Court now rules on the Motion argued in January.

FACTUAL BACKGROUND

As noted above, the Third Appellate District has already ruled on the suppression issues and this Court concurs with

the facts and findings in that opinion and incorporates them by reference in this ruling. A copy of that unpublished opinion is attached as Exhibit A. In what is essentially a third supression motion defendant now argues there is a "new issue" regarding whether he was required to identify himself to the arresting officer. He contends that this issue was not fully briefed or argued in the prior Motions.

Defendant's Motion addresses five issues. For the reasons explained below and as more fully discussed in the Third Appellate District's opinion, this court concludes-that none of the issues requires granting the Motion or dismissing the charges. The evidentiary hearing did not disclose any new or substantially different testimony that compels a reversal of the prior decisions in this and the Siskiyou Co. case.

The first issue is whether the initial consensual encounter between the defendant and Sgt. Wiley was transformed into a 4th Amendment violation by imposition of a restriction on defendant's right to leave. Sgt. Wiley was dispatched to Red Bluff High School on a report of a man trying to take pictures of children at the school. When Sgt. Wiley found the defendant, who matched the description of the suspect, he was standing on a bluff about ten feet above a trail near the school. He appeared to be changing his clothes. Wiley also observed a partially concealed backpack near .the defendant. The defendant identified himself to Sgt. Wiley by providing his name and date of birth. Sgt. Wiley relayed this information to Dispatch but they could not find a match for it. Defendant argues that if Dispatch has been able to verify his identity, he would have been free to leave.

During this first detention, Sgt. Wiley and defendant discussed the defendant's activities and based on defendant's responses, Sgt. Wiley felt some suspicious activity was occurring. The defendant volunteered that he had a driver's license in his vehicle. Sgt. Wiley and defendant went to the vehicle that was in an opposite direction from the defendant's

location. The license was valid and verified the name and date of birth which defendant gave at the initial encounter.

This court concludes that such a detention was constitutional based on the fact that Sgt. Wiley could not immediately verify the defendant's identity and was authorized to obtain more information. Had Sgt. Wiley not been able to detain the defendant, he may not have been able to relocate him in the future. Once the defendant presented a driver's license he was not free to leave because of the additional circumstances, which led Sgt. Wiley to the location in the first place.

The recent case cited by the People, *U.S. v. Christian, supra*, does not support the defendant's arguments that the detention was unconstitutional. In *Christian*, the Ninth Circuit analyzed the detention of a suspect under *Terry v. Ohio*, 392 U.S. 1 (1968) against a standard of reasonableness under the totality of the circumstances. Noting that failure to identify oneself cannot, on its own, justify an arrest, nothing in case law prohibits officers from asking for or demanding a suspect's identification. Interrogation, which may include both a request for identification and inquiry concerning suspicious conduct of the person detained, has been approved. It is important that police be able to identify suspects to fully investigate possible criminal behavior. In the present case, even though the information initially provided by defendant was correct, it could not be immediately verified and Sgt. Wiley was justified in continuing the detention. The mistake by Dispatch in not immediately verifying defendant's identity does not rise to the level of a constitutional violation.

Defendant would have the Court dissect and parse each minute of this encounter to conclude that at several points during this event, defendant should have been allowed to leave. However, each fact cannot be viewed in isolation without a context.

The second issue is whether the prolonged detention from the initial contact to arrest violated the 4th Amendment.

The testimony of Sgt. Wiley indicates that less than one hour elapsed between the first contact and the arrest. Sgt. Wiley, now having identified the defendant from his license, still had strong suspicions about defendant's activities that required he be detained until more facts could be developed leading to either an arrest or release. Defendant's suspicious behavior, the time required to interview witnesses, and the delay of less than one hour cannot reasonably be viewed as a constitutional violation.

The third issue is whether the arrest was without probable cause.

Sgt. Wiley's testimony was that he had a report of suspicious activity. When he talked to the defendant, he admitted taking pictures of children. In and of itself, the picture taking may have been legitimate. However, the defendant's location and conduct at the initial encounter aroused further suspicions that needed investigation.

The fourth issue is the constitutionality of the statute PC 647.6, and whether it is void for vagueness.

This issue was discussed at the P.C. 995 hearing in this case on June 3, 2003 and as stated by Judge Couzens, many courts have upheld the statute previously. He further noted that the law does not require suppression for an arrest based on a statute later declared void. On appeal of that decision to the Third Appellate District, review was denied and the California Supreme Order declined review of the order.

The fifth issue is whether the defendant's Fifth Amendment right to travel has been unconstitutionally restricted because he could not provide identification to Sgt. Wiley at the time of the initial contact.

This issue again relates to the identification issue discussed, *supra*. Since this court finds that there was no 4th

Amendment violation in the detention or arrest of defendant, it cannot find a 5th Amendment violation based on the same facts.

RULING

For the foregoing reasons, defendant's Motion to suppress evidence and dismiss the charges is denied.

Date: April 30, 2004

/s/ Sandra Faithfull McKeith
SANDRA FAITHFULL MCKEITH
JUDGE OF THE SUPERIOR COURT

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

[Filed APR. 21, 2004]

No. 62-099665

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

WILLIAM VOGEL,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON 1538.5 MOTION

Had in the above-entitled matter on
Wednesday, January 7, 2004, 8:30 a.m.
Before the Honorable SANDRA MCKEITH, Visiting Judge

FOR THE PEOPLE:	BRAD FENOCCHIO District Attorney 11562 B Avenue Auburn, CA 95603 BY: DAVID BROADY, Deputy
FOR THE DEFENDANT:	DANIEL A. HOROWITZ ATTORNEY AT LAW 120 Eleventh Street, 2nd Floor Oakland, CA 94607
Reported by:	Kim Goldsberry Certified Shorthand Reporter State License Number 10376

AUBURN, CALIFORNIA
WEDNESDAY, JANUARY 7, 2004, 8:30 A.M.
DEPARTMENT NO. 3
HON. SANDRA MCKEITH, VISITING JUDGE

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[2] THE COURT: Good morning Ladies and Gentlemen. I'll first take the matter of People vs. William Michael Vogel, Case 62-099665.

Counsel, state appearances for the record.

MR. BROADY: David Broady on behalf of the People.

MR. HOROWITZ: Daniel Horowitz for Mr. Vogel.

THE COURT: This matter is on for a Motion to Suppress pursuant to Penal Code Section 1538.5. In this motion the defense is requesting that the Court suppress all of the statements, item of evidence, and the arrest in 1999 which led to the charges in the pending case.

I have discussed this matter with counsel in chambers and the hearing today will be primarily for the purpose of receiving testimony from the officer of the Red Bluff Police Department who initially made contact with the defendant. And it's the understanding, I believe, of both parties that I will subsequent to the hearing today take the matter under submission to consider and review in detail the items of which the Court has been requested to take judicial notice, those being certain preliminary examination hearing transcripts and other related matters both in this county and from other jurisdictions.

Is that correct, counsel?

MR. HOROWITZ: Yes.

[3] MR. BROADY: Yes Judge.

THE COURT: Thank you.

Having said that then, I'll also note for the record that I have reviewed the opposition and the reply brief to the Motion to Suppress, which has a notation that it was received but not filed with the Court for lack of an original signature, which I'm sure Mr. Horowitz can clarify and sign this morning when we conclude with the hearing.

MR. HOROWITZ: Thank you.

I was overseas at that time.

THE COURT: I see that from the declaration previously submitted.

MR. HOROWITZ: Your Honor, may I ask, do you have the actual opening brief also—the actual Notice of Motion and Motion to Suppress?

THE COURT: I have the document Notice of Motion and Motion to Suppress filed September 16, 2003, when it was set for hearing September 29 with Judge Couzens.

MR. HOROWITZ: Yes.

THE COURT: Subsequent to that I have the People's Opposition to the Motion which was filed September 23, and also this reply brief which was received on October 17.

So I believe those would be the documents for this mornings proceedings.

MR. HOROWITZ: Yes Judge.

THE COURT: Thank you.

You may proceed, counsel.

[4] MR. BROADY: Thank you Judge.

I think what we were planning to do was I was going to start off and ask to introduce several items. One would be a transcript from April 26 and April 27, 2000, from Siskiyou County Superior Court. One would be a copy of a Third

District Court of Appeals ruling in the Siskiyou County case on the merits of the suppression motion that was pursued there. And the third item would be an operational directive from the Red Bluff Police Department.

I'll show these to counsel. If counsel has no objection I think the easiest way would be to mark them as People's 1, 2 and 3 for purposes of this hearing.

THE COURT: That's fine.

MR. HOROWITZ: I have no objection to them being admitted.

THE COURT: Thank you, Mr. Horowitz.

(Thereupon the above-referenced documents were marked for identification as Exhibits No. 1, 2 and 3.)

THE COURT: Mr. Horowitz, were there any other documents you wanted to present at this time?

MR. HOROWITZ: No, your Honor.

THE COURT: Thank you.

MR. BROADY: Judge, I would be prepared to call Sergeant Wiley to testify.

THE COURT: All right.

Sergeant Wiley, please step forward.

[5] TESTIMONY OF

SERGEANT TED LEWIS WILEY,

a witness called by the People, having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. BROADY:

Q. Mr. Wiley, are you employed as a sergeant working for the City of Red Bluff Police Department?

A. Yes.

Q. For how many years have you been a police officer with that department?

A. 26 years.

Q. Did you previously testify in a suppression hearing involving William Vogel?

A. I testified at a hearing in Siskiyou County. Is that what you're referring to?

Q. Yes.

The man I reference as William Vogel, is that person here in court?

A. Yes he is.

Q. Where is he sitting and what is he wearing?

A. Orange shirt, seated next to defense counsel.

MR. BROADY: May the record reflect the witness has identified the defendant?

THE COURT: The record will reflect the in-court identification.

MR. BROADY: Thank you.

Q. The previous testimony you gave in a hearing related [6] to Mr. Vogel, have you had a chance to review a transcript of that testimony?

A. I did.

Q. Having had a chance now to review that transcript is there anything that you recall now that's different than your previous testimony?

A. No.

Q. And just to be clear, was it easier for you to remember the details of the contact you had with Mr. Vogel at

the time that you previously testified, or is it easier for you to remember those details today as we sit in court?

A. At the earlier date; the hearing.

Q. Okay.

There were just a couple areas I wanted to ask you about. One of those was the—for lack of a better term, time elements—that were involved in the contact that you had with Mr. Vogel.

What date was it that you had contact with him?

A. July 20, 1999.

Q. At my request did you provide a dispatch log of the call that day, July 20, 1999?

A. Yes.

Q. Did that dispatch log help you to recall times involved such as when you were dispatched out there, when you contacted Mr. Vogel, witnesses, et cetera?

A. Yes. In some of those cases, yes.

Q. Tell us what you can recall, and if you need to refer [7] to the dispatch log feel free.

A. I would like to refer to it.

Q. Please do so.

MR. HOROWITZ: Do we want to mark this since he is reviewing it and it will essentially be part of the record?

MR. BROADY: If you want to.

MR. HOROWITZ: I think so, so it's in the record.

THE COURT: The dispatch log, I assume, is more than one page.

Fine; that can be marked as People's Exhibit 4.

Mr. Horowitz, you have no objection to having that received into evidence?

MR. HOROWITZ: No objection.

THE COURT: Thank you.

(Thereupon the above-referenced document was marked for identification as Exhibit No. 4.)

MR. BROADY: Thank you, Judge.

Q. Let me show you Exhibit No. 4.

Do you have the original copy of the same log?

A. Yes. That's the same document I have in front of me here, a copy of it.

Q. So to your best recollection, including your consideration of the log, what time did you respond on the call involving Mr. Vogel?

MR. HOROWITZ: Can the record reflect what's going on is that the witness is reading from the log into the record, and that's fine, I'm not objecting, I just want [8] the record to show that.

THE COURT: The record will so reflect.

THE WITNESS: The dispatch log shows that I was dispatched at 1908, or 7:08 p.m. that date to the high school—Red Bluff High School.

MR. BROADY: Q. And do you know what time you arrived?

A. The log indicates 1910, or 7:10 p. m.

Q. Is there anything—is your own independent recollection any different than the information contained on the log?

A. No.

Q. Approximately, if you know, what time would you have had your first contact with Mr. Vogel?

A. I believe that's also indicated on the dispatch log. Am I speaking loud enough?

THE COURT: Yes.

THE WITNESS: Apparently I radioed at 1915 hours that I was making contact. It doesn't say with the subject, but at that location. It would have been with the subject.

MR. BROADY: Q. What's the next time period that you recall something specific occurring?

A. From the log, or from my report?

I'm not sure they're exactly the same.

Q. Okay.

To the best we can, I'm trying to identify times when different things happened.

[9] So it indicates you contacted somebody—according to the log presumably Mr. Vogel—at 7:15 p.m?

A. Yes.

Q. To the best you can recall what was the next thing you did after contacting him?

A. I spoke with him. I asked him for some identification.

Q. At some point in time was Mr. Vogel detained?

By that I mean was he not free to leave?

MR. HOROWITZ: I would just object to the use of the word detained. Not free to leave, as long as it's being asked subjectively to the officer, I have no objection to.

THE COURT: Not asking for a legal conclusion, in other words?

MR. HOROWITZ: Correct.

THE WITNESS: Would you repeat the question?

At some point was he detained—was that the question?

MR. BROADY: Q. Yes.

A. Yes, he was.

Q. At what point was that?

A. It would have been—well a few minutes after I contacted him.

I asked him for identification—do you want me to expand?

Q. Please.

A. I asked him for identification of who he was. He gave his name and birth date. I called that into dispatch [10] and asked them to see if they found any driver's license or ID matching that.

Q. Let me ask you, does that show up on the dispatch log?

A. I'll look and see.

No, it does not.

Q. So you asked dispatch for running of the name and DMV.

Then what happened?

A. They replied they couldn't find a driver's license or ID match under that name and birth date. At that point I asked—Mr. Vogel said he had a driver's license in his vehicle.

Q. Okay.

What happened then?

A. I asked him to show it to me. I did tell him at that point he was not going to leave until. I was able to identify him.

Q. Where were you located at that time when you told him he was not free to go until you identified him?

A. We were south of the high school parking lot in kind of a wooded undeveloped area behind some houses.

Q. Okay.

What happened next?

A. He said he had a driver's license in his van and offered to show it to me, so we walked to where his van was in the parking lot and he ended up retrieving his driver's license and showing it to me.

[11] Q. About how much time would have passed now from your initial contact with Mr. Vogel until you got over to the van?

A. Oh, I would guess about ten minutes. I could check my report and see if it gives any other times.

Q. Please do so.

A. Okay.

I don't have any times between contacting him and basically starting to talk to witnesses, so I would guess about ten minutes.

Q. Okay. And then what occurred at the van?

A. After he retrieved his driver's license, at that point he was redetained and I started trying to contact possible witnesses in the area.

Q. According to either your recollection or the log, what is the next specific thing that happened that we can tie to a time?

A. Okay.

On my report I show a time of 1930 hours that I started speaking with one of the children in the area.

Q. What was that child's first name?

A. Cody.

Q. And what is the next specific thing that you can tie to a time?

A. I have that at 1950 hours I was speaking with a juvenile, first name Miranda.

Q. And once again what is the next specific act that you can tie to a time?

[12] A. On my report I show 2010 hours I placed Mr. Vogel under arrest.

Q. Does the dispatch log have any other times?

A. At 1917 hours it says in back of the new house three houses south of 1st on Douglas.

Q. You said 1917, so 7:17 p.m?

A. Yes, sir.

Q. What is that referring to?

A. That would be me trying to let them know where I was at contacting Mr. Vogel.

Q. Any other times that we haven't talked about that are on the dispatch log?

A. The log shows 2015, or 8:15, as another officer calling in that I had a prisoner.

Q. Any other times?

A. Want me to give you the times on the dispatch log?

Q. At the end what I was going to do—I'll ask it now.

The times on the dispatch log, are those—do you have any recollection that makes you doubt the accuracy of the times on that log?

A. Well just from practice, my arrest time on my report would be sooner than the dispatch time because another officer radioed it in and there was apparently a delay between the actual arrest and the time dispatch was noticed. It's a five minute difference there. That's the only thing that would come to mind.

Q. Does the log make any references to the securing of any property?

[13] A. At 2159 hours, dispatch log has an entry that myself, my radio number, advised that his vehicle had been towed and stored—Mr. Vogel's vehicle.

It says the suspect was booked at Tehama County Jail.

Q. What time?

A. 2159.

Q. 9:59?

A. Yes, sir, 9:59.

Q. In this particular case you indicate arresting Mr. Vogel right around 8:10 p.m?

A. Yes.

Q Once he was arrested did you maintain control of him or did another officer have him?

A. Officer Robilio transported him to the Police Department for me.

Q. After Mr. Vogel was gone from the scene what else did you do in the investigation?

A. At that point I searched the van, doing an inventory search of his van, which had numerous items in it, so I was basically making a list of those items.

Q. And the search that you conducted at that time, were you aware of any Red Bluff Police Department policies or operative directions regarding inventory searches?

A. Yes.

Q. Was your inventory of Mr. Vogel's van pursuant to the Red Bluff Police Department policy?

A. Yes.

Q. Are there any other times that I've failed to ask [14] about?

A. Not that I can think of.

Q. Okay.

MR. BROADY: Thank you.

That's all the questions I have.

THE COURT: Mr. Horowitz.

MR. HOROWITZ: Thank you.

CROSS-EXAMINATION

BY MR. HOROWITZ:

Q. Sergeant, what was the information in the dispatch call, as you can recollect right now?

A. A man in the area of the high school taking pictures of children.

Q. And when you heard that information, in your own mind subjectively did you have any particular crime that you thought was committed based upon that information?

A. Well I would have had some suspicions, but I can't conclude a crime was being committed.

Q. Now when you arrived did you in fact talk to an adult before you contacted Mr. Vogel?

A. Yes.

Q. Do you recall the name of that adult?

A. Yes.

Q. What name?

A. Shari Lemmon.

Q. And how is that spelled, for the reporter?

A. I believe L-e-m-m-o-n.

Q. And what information did she provide to you, as best [15] you can recollect, and if you can't recall tell me and then look at something.

But first, if you can recollect.

A. As I recall she said that she had seen a man—well a man—there was a man taking pictures of children, and he had left the area, and she directed me in a certain direction.

I would like to double check that on my report.

Q. Go right ahead.

A. The report says that she said a man had been taking photos of her daughter and other children, and she pointed me in the direction the man had left.

Q. So both on dispatch and upon arrival you had the same information, photographs were being taken by a man—presumably an adult—of children; correct?

A. Correct.

Q. And you also had a description of the man from dispatch; is that correct?

A. Yes.

Q. Shorts and shirt of some type?

A. What I recall is that he had salt and pepper hair and he was carrying a backpack.

Q. After some efforts you saw a man meeting that description; is that correct?

A. Yes.

Q. That's Mr. Vogel.

And you approached him; correct?

A. Yes.

[16] Q. Now at that point was he doing anything—at the point of approach was he doing anything that indicated to you that he was either committing a criminal act or had recently committed one?

It's an open question. You can throw in anything you want.

A. Okay.

He was in an area—what do I say.

It was—I said it was wooded, but it's really a grassy area behind some houses, kind of undeveloped and not visible from the parking lot so you would think he was trying to hide.

Q. You can think.

Is that what you thought at that time?

A. It was a possibility, yes.

Q. Was it like a grassy knoll?

A. Well there's a ridge.

There's a baseball field, and you walk behind it and there's a ridge that goes up about ten feet and it's level to the street, and he was on top of that ridge in a grassy area.

Q. Were there any other people in that grassy area?

A. No.

Q. Were there any children in that grassy area?

A. No.

Q. Was he taking pictures in that grassy area?

A. I didn't see him, no.

Q. Was he engaging in any sexual conduct in that grassy [17] area?

A. Not that I saw.

Q. So at that point when you approached him you suspected he was a person taking pictures of children and he was now in this grassy area and you had located him; is that correct?

A. Well he met the description of the person I was given, yes.

Q. What was the first thing you said to him?

A. If I can refer to my report?

I can guess, but—

Q. Better to refresh your recollection.

Tell me if you're reading from the report, because at the time it was your accurate memory of what you were writing down, or if you're truly having a fresh memory after looking at it. That's all I ask you to do after reading the reports is to make that distinction.

There's ways to refresh recollection. One thing is to look at something and say, yes, now I remember, or you can read from it. As you use your report please let us know whether you presently recall or if you're just reading.

A. Okay.

I know at some point I contacted him, if not immediately. I would have asked what he was doing there and who he was. But if you don't mind I'll check my report.

Q. Sure; thank you.

[18] A. In my report I indicate that I asked his name initially right off the bat, and I guess that refreshes my memory.

Q. Did he give the name William Vogel?

A. Yes.

Q. Did you ask him for his date of birth?

A. I did.

Q. Did he give you his date of birth?

A. He did.

Q. Now whether you want to look or not—first see if you remember—is it true that the name and also the date of birth that he gave you verbally match the name and date of birth that you later saw on the driver's license?

A. I believe they did match; yes.

Q. Are you certain, because if you need to look—

A. I'll double check, but I believe it turned out they were both correct.

Q. Look at the top of Page 3 and you can see the name and date of birth he verbally gave you.

A. 5/5/53.

Q. Right.

So he did give you the accurate information at that point?

A. Yes.

Q. Did you immediately call in that name and date of birth?

A. It would have been very soon, yes.

Q. And just as an estimate, how long did it take for [19] dispatch to respond back to you as to whether they got a hit on that name and date of birth?

A. I would be guessing. Typically it only takes a minute or two max.

Q. Now they did not find anything?

A. That's what they advised, they found no match.

Q. Now later when you had his driver's license, what information did you provide which in that case did yield a correct result?

A. I don't know that I noted that, but I would have given a driver's license number.

Q. Have you ever, as part of your investigation with this case, found out why—given that he gave the correct name and correct date of birth and had a valid driver's license with that same name and date of birth—when dispatch ran it they did not get a hit?

A. I don't know why; no.

Q. Did you make any inquiry about that?

A. If I did, I don't recall.

THE COURT: Excuse me, counsel. Let me just ask.

Sergeant, was this a California Driver's License or Nevada?

THE WITNESS: California.

THE COURT: Thank you.

Sorry, Mr. Horowitz.

You may proceed.

MR. HOROWITZ: Q. When he gave you a name and date of birth that did not come back with a hit, did that [20] affect

your subjective belief as to whether or not he was perhaps committing a crime?

A. Well it increased my suspicion, if that answers the question.

Q. Why did it increase your suspicion?

A. It raised the possibility that maybe he was not who he said he was, which would have indicated he was trying to hide something.

Q. Now at the point you asked him for his name and date of birth, you sent it to dispatch and then dispatch responded back saying, no, we don't have a hit on this.

At that point when there was no hit was he free to leave?

A. No.

Q. Why not?

A. I wouldn't have let him leave.

Q. What factors were you considering analytically to reach that conclusion?

A. The call.

As the call came in I suspected there may have been a crime regarding children or—

Q. I can't hear.

A. There may have been a crime either annoying children or something else, and I felt I needed to investigate that further before I could let him go.

THE COURT: When you say when the call came in, are you referring now to that first dispatch that you got?

THE WITNESS: Meaning the dispatch when they told me [21] what was going on—yes.

THE COURT: Okay.

MR. HOROWITZ: Q. So even before the name and date of birth came back without a hit, even then he was not free to leave; is that correct?

A. That's correct.

Q. Then you spoke to him about what was going on and he did admit to you or tell you he was taking pictures of children; correct?

A. No.

Q. He did not?

A. No.

Q. Did he make any comment to you about taking pictures of children?

A. I believe he asked if it was against the law to take pictures of children.

Q. You asked him if he was taking pictures of children; is that right?

A. I believe I told him why I was there, that I had received a report of someone taking pictures of children in the area. Whether I asked him if he was, I'm not sure. I could refer to my report and see if that refreshes my memory.

Q. Before you do that, do you recall that he told you that people at the school had called him a child molestor and he left?

A. He told me that; yes.

Q. Then he said he did not want to make any [22] incriminating statements and asked you if taking pictures of children was a crime; is that correct?

A. Correct.

Q. Then when he asked you if taking pictures of children was a crime did you respond?

A. I did.

Q. Do you recall what you said?

A. I think I said I wasn't sure at this point, or something along those lines. I would have to read my report to see what I recall from that point.

Q. At that point did you understand that simply taking pictures of children was not against the law?

A. Correct.

Q. So your issue was whether there was additional conduct beyond just taking pictures that had taken place; is that right?

A. I needed to find out what had been going on and the context. That's true, just taking pictures of children is not necessarily a crime, at least pictures in public.

Q. Now the adult person, Ms. Lemmon, who you spoke to had only talked about taking pictures, and dispatch only talked about taking pictures.

What other conduct were you looking for in order to determine whether this detention would end or ripen into an arrest?

A. I believe I'd been told the person had left the area when somebody called him a molestor. I believe that was part of the dispatch.

[23] I would have wanted to find out how the person approached these children, what conversation he had with them, and if any other conduct had taken place besides just photographing.

Q. Now just be honest since these are part of the record.

There's nothing in your police report and nothing in the preliminary examination hearing transcript at Siskiyou that

indicates that dispatch made the statement about the kids calling him a molestor. It indicates that he told that to you.

That doesn't mean that you're wrong here today, but do you want to review those documents to see?

A. Sure.

Do you want me to say what the dispatch log says?

Q. No. Just see if what I told you refreshes your recollection that that information came from Mr. Vogel, or if you remember that it was actually dispatched to you.

A. Okay.

In my report and in the dispatch log it does not say or indicate that anyone called him a molestor.

Q. Was that just a mistake, because a lot of time has passed?

A. Yes; at that point.

Later on I was told that.

I may not have known that at the initial contact; that's true.

Q. I think one of the young men you interviewed might [24] have told that to you also; is that correct?

A. Yes.

Q. At what point exactly did you say to Mr. Vogel words to the effect that he is not leaving until he is identified?

A. We were still on the hillside or knoll. I believe it would have been before we walked back to the van to get his driver's license.

Q. So dispatch fails to get a hit on the name and date of birth, and after that you tell him words to the effect he is not leaving until he is identified; is that right?

A. Yes.

Q. Do you recall what words you said to him?

A. I could check my report. I believe it was just you're not going to leave until I get you identified.

Q. And why was it important to you to identify him at that point?

A. Well I suspected, or there was at least a chance that a crime had gone on involving children or annoying children, and I felt it was my duty to make sure that the person who may have been involved didn't just walk away without me at least knowing who it was.

Q. Then he showed you his driver's license and it was shown to be a valid California Driver's License.

Why did you not let him leave at that point?

A. I believed I needed to do further investigation to find out what had occurred.

Q. Now what further information did you obtain after you [25] had properly identified him?

Let me withdraw that.

When he was identified to you was he identified as having, any warrants for his arrest?

A. No.

Q. Was he identified as being on probation or parole?

A. No.

Q. Was he identified as a 290 registrant?

A. No.

Q. Was he identified as somebody who had suffered a prior conviction of any offense whatsoever?

A. No.

Q. What is the next piece of information that you obtained regarding the underlying incident?

A. I spoke first with one of the children named Cody, and then spoke to some other—I believe two other children, and I spoke further with Ms. Lemmon, the original adult I contacted.

Q. The first person you spoke to was a young man named Cody?

A. Yes.

Q. Did Cody tell you that Mr. Vogel touched anybody?

A. Um—

Q. If you recall.

A. I don't think he told me that he saw Mr. Vogel touch anybody.

Q. Did he tell you that Mr. Vogel touched him?

A. No.

[26] Q. Did he tell you that Mr. Vogel caused any child to pose in any particular manner?

A. Could I refer to my report to refresh my memory, please?

Q. Yes.

A. You said you asked if Mr. Vogel asked anybody to pose?

Q. In any particular way, yes.

A. Yes, he did.

Q. What did he say specifically?

A. In my report I have that he said the man—he didn't know Mr. Vogel's name—asked a particular girl to stand in different spots.

Q. And this was on roller blades for one young lady, and a skateboard for the other?

A. I believe Sergeant Shamblin obtained-that information for me, but that sounds correct.

Q. But your information when you spoke to Cody—his last name was Hill, correct—

A. Yes.

Q. —was that he told two young ladies to stand in a certain spot?

A. Yes.

Q. So at this point you've properly identified Mr. Vogel; correct?

A. Yes.

Q. You've identified him without any criminal history coming up whatsoever at that time?

[27] A. Right.

Q. You've found that he was taking pictures of children, and when the children called him a molestor he left; correct?

A. Yes, I did find that out.

Q. And you found out that at that point there was no physical touching of the children and no posing information regarding any sexual poses that was conveyed to you; is that correct?

A. You're saying after I spoke with Mr. Hill?

Q. After you spoke to Cody Hill.

A. Right.

Q. And you also spoke to Ms. Lemmon who had not indicated any touching and had not indicated any sexual

posing of the children; she simply said the man was taking pictures.

Is that also true?

A. At that point, yes.

Q. Was Mr. Vogel free to leave after you spoke to Cody Hill?

A. No.

Q. That's because you wanted to continue further investigation?

A. Yes.

Q. Who did you speak to next?

A. I believe it was a girl named Tiffany.

Q. She was one of the children who was photographed; is that correct?

[28] A. Yes.

Q. Do you recall whether Tiffany told you that Mr. Vogel had had her pose in any position that you considered to be—because the child is not going to really know—in what you considered to be a sexual position?

A. I believe so.

If I could—I believe she's the one who said he asked her to pose like she was going to do a wheelie on her skateboard.

If I can double check my report.

Q. You can double check your report; yes, please.

A. Yes—I'm sorry—she did indicate he asked her to pose doing a wheelie.

Q. Now did you consider that a sexual pose?

A. I felt it was possible, yes.

Q. Okay. Well anything is possible.

We need to get a little more specific, so let's do it this way.

Did Tiffany tell you that Tiffany felt the pose was sexual?

MR. BROADY: Objection, relevance.

THE COURT: Sustained.

MR. HOROWITZ: Your Honor, it would be annoying and molesting a child, and although it's an objective standard any information he had that the child felt violated would be a factor he could consider.

I think the answer will be that the children were each totally unoffended and not at all upset by the [29] conduct. If counsel will stipulate to that, there's no need to question.

MR. BROADY: I'm not going to stipulate. I think it's irrelevant.

THE COURT: All right, counsel, go ahead.

MR. HOROWITZ: Q. Did Tiffany make any statement to you indicating that she was in any manner annoyed, upset, or offended in any manner by what the person who she called the photographer did?

A. She didn't say that, no.

Q. Now she did describe to you he wanted her to pop a wheelie; is that correct?

A. Yes.

Q. And did she demonstrate to you what that behavior was; what popping a wheelie was?

A. I don't think I had her demonstrate, no.

Q. Did you in your mind have a vision as to what popping a wheelie on a skateboard involved?

A. Yes.

Q. And it was on a skateboard, not a bicycle?

A. I believe so, yes.

Q. That's my understanding from your report.

A. Okay.

Q. What is your version of what popping a wheelie on a skateboard involves?

A. Could be jumping in front of the skateboard up in the air shoving your weight to the back so your weight is on the back wheel and the front end is up.

[30] Q. And what about that understanding in your [ILLEGIBLE] popping a wheelie to you potentially is sexual in [ILLEGIBLE].

A. I would say that if a person attracted young girl just about anything would be sexually attractive.

Q. Now what was the next person that you contacted; was it Shari Lemmon, the mother of Miranda Lemmon?

A. If I can refer to my report.

I believe that's correct.

Q. I hope so.

A. Yeah, it is.

Yes, I talked to Mrs. Lemmon again.

Q. And when you spoke to her did she provide you with any information of any sexual posing involving her daughter Miranda Lemmon or any other child?

A. No, she didn't indicate she had; no.

Q. Did you then talk to Miranda Lemmon?

A. I did.

Q. And did she in any manner indicate to you that the man taking the pictures had offended her, had annoyed her, upset her, or done something she felt was inappropriate?

A. She didn't indicate, no.

Q. What type of posing did she describe the man asking her to do, if any?

A. If I can refer to my report.

Q. Yes.

A. I don't recall at this point.

Q. Top of Page 4.

A. She just indicated she was sitting on her bicycle and [31] the man was sitting down.

Q. And he also once asked her to put one foot on the ground and one foot on the pedal?

A. Yes. I didn't read far enough.

Q. You've now interviewed the children involved in the picture taking and the mother of one of the children.

Why at that point did you not let Mr. Vogel leave?

A. Well I would have also talked to—I further talked to Sergeant Shamblin, who had also spoken to some individuals, and Officer Robilio, so I would have gotten their input as well.

Q. You would have, but at that point you had not yet done that?

A. Okay, right. I don't believe so, anyway.

Q. Well let's be clear.

Check your report and make sure that I'm right on what I just said.

A. Okay.

In my report I go through the people I talk to. That's indicated. Next thing I said is Officer Robilio gave me a statement he had obtained.

Whether that's in perfect chronological order I'm not really sure at this point.

Q. Well let's do it this way.

Was Officer Robilio ever present when you were interviewing the two children or the mother?

A. At this point I'm not sure. He probably wasn't. He certainly wouldn't have been there all of the time. [32] Probably not.

Q. Now there's no indication in your report or in your prior testimony that any of these interviews were conducted with another officer present; is that right?

A. Right.

Q. And generally if another officer was present that would be something you would normally write down; is that correct?

A. Probably, yes.

Q. So why then at the time when you had spoken to these witnesses as you described, and had the information that you described, why at that point did you not let Mr. Vogel go?

A. Well in my mind at that point I think I probably would have had probable cause to believe he had committed the crime involved.

Q. And what factors do you base that answer upon?

A. He is a stranger to Red Bluff. He went to a school which was not in session but there were children in the area. I believe it was an athletic event that was going on. He contacts young mostly girls that he doesn't know, and their parents aren't around. He wants to take pictures of them. He asks

some of them to pose. You didn't cover it, but he basically told one girl he worked for the Parks Department, which isn't true, and was doing a brochure. He had left the area when somebody called him a molestor. He had not gone to his van. He had actually gone the opposite direction and was at least in an area [33] that was concealed.

And I guess that's enough at this point.

Q. So at that point you felt that he was good for the crime of annoying and molesting children; is that correct?

A. Yes.

Q. Now after this point you then obtained other information from other officers who were also in the area; is that correct?

A. Yes.

Q. That would include Sergeant Bruner; is that right?

A. Well he didn't interview anybody. He was with the sheriff's department, and was in the area.

Q. So the People that interviewed and gave you information after this point included Officer Robilio, who told you that he had spoken to another witness who had seen Mr. Vogel with his hand in his pants in the hallway of the school—is that right?

A. Yes.

Q. And is that the sum total of what Officer Robilio told you?

A. Yes.

Q. Did Officer Robilio tell you there were any children present when that was happening?

A. I don't know that he told me that there were.

Q. It's not in your report, is it?

A. No.

Q. That would be a point, you would write down, wouldn't you?

[34] A. Well not necessarily.

Q. Wait a minute; okay.

I know you're a good officer. If there's a report with a man with his hands down his pants in a school hallway with children present you're going to write that down, aren't you?

Even I would write that down.

A. Well there were children everywhere at that time, so it would have been redundant.

Q. Well that's not true, is it?

Were there children in every portion of the hallway?

A. There were many children in the area, and if there wasn't a child somewhere in sight it would have been unusual.

Q. Strangely, by the way, just like Sandy Colfax of the L.A. Dodgers.

See how I have my finger in my belt like this?

Did you ever ascertain how much the hand in the pants report—how far the hand went in the pants?

Because they used to tease Sandy Colfax about that. He used to do it on the mound.

A. Oh, is that right.

Officer Robilio indicated the fellow he talked to, who I believed was Mr. Thornhill, said he had his hand down his pants and he thought it looked strange.

Q. You put on your report inside his own pants.

A. Is that what I put?

Q. Yes.

[35] Who is this Thornhill; an adult or child?.

It doesn't say in the report.

A. I believe he is 17. I can double check.

I call it the face sheet where you give the names and information, and it lists him as 17 years old. He is a male.

Q. So is it true then that all you really got from Officer Robilio was that a 17 year old had seen Mr. Vogel in the hallway of the school and he had his hand inside his own pants and it was strange to Thornhill?

A. That's basically it, yes.

Q. There was no indication he was touching his private parts at that time; is that right?

A. I think he could have inferred that, but he didn't specifically say that, no.

Q. If a 17 year old saw a man essentially masturbating in a school hallway, that would be something you would write down, wouldn't it?

A. If he used those words I would have written it down, right.

Q. You're not the delicate type where that was told to you but not to offend anybody reading your report you just wrote it gently; is that right?

A. I would have been specific in that case.

Q. Are you aware of any documents by Officer Robilio that are more explicit than what we've been talking about here, which is hands inside his own pants.. looking strange?

A. I don't believe Officer Robilio wrote a supplement.

[36] THE COURT: Just to clarify, this is both hands; not just one?

Is that what your report indicates?

THE WITNESS: I'll refer to my report.

MR. HOROWITZ: Q. Maybe you can read the sentence.

A. Officer Robilio told me he had spoken with witness Thornhill. Thornhi[11] said he had seen Vogel in the hallway of the school. Vogel had his hands, plural, inside his own pants.

MR. HOROWITZ: I agree that sentence was read correctly.

The last sentence was it looked strange to Thornhill.

Q. At that point you asked dispatch to run a criminal history check on Mr. Vogel; is that correct?

A. Yes.

Q. And you believed that Mr. Vogel was in violation of 467, annoying or molesting children under 18 years of age; is that correct?

A. Yes.

Q. Was this an arrest for having his hand inside his pants in the presence of Mr. Thornhill, who was 17?

A. Not specifically, no.

Q. Specifically what was this arrest for?

A. I would say the totality of the circumstance, given the three or four people I spoke with and information from the other officers.

Q. So anything else, other than what you've testified about in court today, that contributed to your making the [37] arrest at that time?

A. I have to review it.

Sergeant Shamblin, he spoke with Cody Hill also.

Q. Slow down.

I want to know in your brain at that time what you relied upon. If that's something you relied upon please tell me.

A. I would have relied on that information as well. I also was aware or was reminded of a be-on-the-lookout for what turned out to be a similar incident in Siskiyou County.

Q. Wait a minute.

You were not aware of that until somebody pointed it out after the arrest; isn't that right?

A. I believe I testified in the hearing in Siskiyou County that I was almost sure that that was brought to my attention prior to the arrest.

Q. You don't recall right now, do you?

A. Don't recall what?

I recall my testimony, because I reviewed it a little while ago.

Q. But there's nothing in your police report about that, is there?

A. Well I do mention that in my police report.

Q. As coming after the fact?

A. No, I think it's not clear in my report exactly when it happened.

Q. So you have no present memory as to when you knew [38] about the be-on-the-lookout?

A. I would defer to my earlier testimony.

Q. So you have no present memory?

A. I have present memory of being advised of that. At this time I wouldn't swear that I received the information before, but like I said I'll defer to my earlier testimony.

Q. Let me read from Page 52 of the transcript, Lines 8 through 15.

THE COURT: Do you have that transcript?

THE WITNESS: I have a copy.

Do you want me to follow along?

THE COURT: We can all follow along.

Just a minute.

Do you have that, Sergeant?

THE WITNESS: Yes.

MR. HOROWITZ: Let me read it out loud so it's on the record.

"Question, at some point prior to the arrest of the defendant did you receive any information from your dispatch regarding Siskiyou County?

Answer, I don't recall at what point I received that information from dispatch. Actually at the point Sergeant Bruner mentioned it, it jogged my memory and I did remember seeing a similar BOLO at some point in the past few days."

MR. HOROWITZ: Q. So what I'm getting from that—correct me if I'm wrong—is that until Sergeant Bruner [39] mentioned it, your memory—you did not recall the BOLO, but when he mentioned it it then jogged your memory that that BOLO had been communicated some days earlier?

Is that what your testimony meant?

A. Yes. He jogged my recollection.

Q. And Sergeant Bruner didn't talk to you about that after the arrest; isn't that correct?

A. What I'm saying is—

Q. Answer my question first. Then you can explain.

MR. BROADY: I'll object as to the answer.

THE COURT: The objection is sustained.

MR. HOROWITZ: Q. When did you talk to the sergeant; before or after the arrest?

A. I believe—I'll defer to my earlier testimony, which if you look on Page 51 I think it's a little more enlightening as to the time I think it may have occurred.

Starting Line 13 on Page 51.

MR. HOROWITZ: Q. What does the dispatch log show regarding what time—we should probably read that into the record, shouldn't we?

THE COURT: You're referring to Sergeant Wiley's response reflected at Line 13?

MR. HOROWITZ: Yes.

THE COURT: The answer: "I believe I got the information from Sergeant Bruner prior to the arrest. I don't know that I could swear to that 100 percent, but I'm also positive I did because he arrived shortly afterwards. He reminded me there was a be-on-the-lookout [40] for a child molest suspect from Siskiyou County who matched the description of the man, and also the activities were very similar.

MR. HOROWITZ: Q. Now is there anything in your police report that indicates that this information was communicated to you by Sergeant Bruner?

A. In my police report?

Yes, there is.

Q. Okay.

And in your report it comes after you say you place Mr. Vogel under arrest; is that correct?

A. Yes, it does.

Q. Now did you deliberately write your police report in a sequence in terms of when the events occurred?

A. Typically I start out that way, but not everything is necessarily chronological.

Q. Is there anything in your police report that's out of chronological order other than this paragraph which is—I guess it's fair to say it's in dispute?

A. Well I have to read the whole thing again.

Q. I think it's important that you do; please.

A. Well I guess my first page, about the eighth paragraph down, it says Sergeant Bruner and another deputy arrived to assist.

My recollection at this point, a deputy arrived in the area prior to my contacting Mr. Bruner—

THE COURT: Prior to contacting Mr. Vogel, you mean?

THE WITNESS: Yes—I'm sorry—prior to contacting [41] Mr. Vogel.

So there was a deputy in the area, so I've noted that out of chronological order.

MR. HOROWITZ: Q. And anything about what witnesses said to you or anybody said to you that's out of chronological order?

A. That's as far as I've read so far.

I just wanted to note that.

My receiving the information from Officer Robilio—and we may have covered that—I'm not sure at what point he came back to me and said this is what I found out. It may have been while I was in the midst of interviewing these other subjects. And like I said, the same about Sergeant Shamblin relaying his information to me, because I do recall he had to leave the scene for another call while I was still involved in investigation. So that isn't necessarily in chronological order.

MR. BROADY: If we can clarify, who had to leave?

THE COURT: Sergeant Shamblin had to leave for another call.

MR. BROADY: Okay.

THE WITNESS: And as I said, I'm not sure at this point when Sergeant Bruner mentioned the BOLO; at what point during the investigation.

MR. HOROWITZ: Q. Well you have the dispatch log in front of you. Does it show—it says in your police report that after Sergeant Bruner advised you of the BOLO, that you asked dispatch to locate it.

[42] What does the dispatch log show?

A. I don't see anything on the dispatch log that references the BOLO. It doesn't reference it.

Q. Does it reference communication from you to dispatch of any type; so when you would have been calling them?

A. Regarding criminal history?

Q. Well you ran the criminal history.

What time does that show?

A. It doesn't show, that I see.

Q. So this dispatch log does not show when you asked for the criminal history and it also does not show when you asked them about the be-on-the-lookout?

A. Correct.

Q. In general you try to keep your crime reports sequential in terms of time; is that right?

A. Usually that's the easiest way to write them, yes.

Q. In fact that's part of the training in writing reports, and if you didn't do that you might get criticized; is that correct?

A. Not necessarily.

Q. In other words if you mixed and jumbled all of the paragraphs your supervisors would think that's just swell?

A. Well depending on the kind of report.

A sequential report is typically appropriate and the most easiest to follow, but when you're writing it there may be information that you want to add and maybe you feel you don't have to go back and put it in the middle of another paragraph.

[43] Q. Let's talk about this case.

You didn't bring a typewriter with you to the scene; you had handwritten notes—is that right?

A. Correct.

Q. What you did is you took your handwritten notes, sat down next to a typewriter and typed this report from your notes; is that right?

A. Correct.

Q. Did you just go sequentially through your notes as you typed this?

A. I went through my notes, yes.

Q. Did you go sequentially through your notes as you typed this?

A. I don't remember.

Q. What is your normal practice?

A. To go through the notes and type the report.

Q. Sequentially?

A. No.

Typically that's how things are written; that's true.

Q. You're not different, are you?

A. It depends who you talk to—no.

There's things I may have not taken notes on.

Q. Sure, but you've got to answer my question, please. Sequentially is normally the way you transcribe your handwritten notes when you type them; is that true?

A. Although I don't transcribe them.

I type them.

Q. Is that how you do it?

[44] A. That's the best way to relay information; yes. And that's typically how I do it.

THE COURT: Sergeant, do you basically go through all of your notes before you start the report, or do you just start at the beginning of the report with the first note that you have, or do you go through it and organize it mentally and then start writing?

THE WITNESS: Mentally I think I form an outline and put the information into that.

MR. HOROWITZ: Q. What the Court just asked you is not whether you mentally formulate an outline, but if you go through the notes first, form an outline, and then start typing?

A. Right.

You would review your notes of what happened, and in your mind figure out how you're going to put it down on the paper to relay it, and then type it out.

Q. In this case a sequential approach was the approach that you generally took in this report; is that correct?

A. More than likely, yes, I'm sure it was.

Q. Where are your handwritten notes now?

A. Probably been recycled several times. We don't keep them.

Q. They're gone?

A. Yes.

Q. Is there any document or any entry anywhere that would reflect the time sequence with respect to these events other than this document that you've submitted as [45] your police report, and the dispatches which you've got in front of you?

A. Not to my knowledge.

Q. Who was present when you placed Mr. Vogel under arrest, if anyone?

A. Well I'm reasonably sure there was another officer there, but at this point I'm not sure who it was.

I'm sorry—my best guess would be Officer Robilio, because he transported him for me.

Q. Okay.

A. I'm not sure if one of the sheriff's deputies was still there or not.

Q. Well when did Sergeant Bruner arrive then?

A. I believe he arrived fairly soon thereafter I got to the area. The sheriff's department was my initial backup because our officers were busy.

Q. When did Sergeant Bruner first make contact with you?

A. I'm not sure. If you want to reference it to some point, it would have been prior to—well, go ahead—I'm not sure.

Q. Do you know if Sergeant Bruner was present during any of your interviews with any witnesses?

A. I'm reasonably sure he was not.

MR. HOROWITZ: If we can have a moment, please, your Honor?

THE COURT: Sure.

MR. HOROWITZ: I have no further questions, your Honor.

[46] THE COURT: Thank you.

Mr. Broady?

MR. BROADY: Yes, Judge.

Thank you.

REDIRECT EXAMINATION

BY MR. BROADY:

Q. Officer, I want to be as clear as we can about the first time that you communicated anything to Mr. Vogel, anything about he was not free to leave.

A. It would have been when I was attempting to establish his identification. At that point I told him he couldn't leave until he was identified or he wasn't going to leave until he was identified.

Q. Was that before or after he initially gave you the name of William Vogel and the date of birth of 5/5/53?

A. I believe it was after he gave me his name.

Q. Okay.

Suffice it to say, the testimony you've given this morning is not—my questions and Mr. Horowitz's questions have not brought out all of the details of the facts as you knew them at the time you made the decision to arrest Mr. Vogel; is that right?

A. I don't believe all of the details have come out, no.

Q. And you've had a chance to review the transcript of your prior testimony.

Are those details contained in that transcript?

A. I don't know if all of the details came out in that.

I'm sure most of them did.

[47] Q. More details in the prior transcript, or more details today?

A. I would say in the prior transcript.

MR. HOROWITZ: I thought he did better today.

MR. BROADY: Q. Officer Robilio—I want to clarify the information that we've talked about that Officer Robilio had relayed to you.

Do you recall at this time whether or not he relayed information to you before or after you arrested Mr. Vogel?

A. It would have been before—I'm sorry.

Do I specifically recall that in memory?

I'd say no.

But I'm sure that I would have gathered all of the information before making the decision, and I think that's reflected in my report.

Q. And what I was going to refer you to was Page 54 of the transcript on that issue.

A. Thank you.

Q. Lines 3 to 9.

MR. BROADY: With the Court's permission, Judge, if I just read into the record starting actually at Page 54, Line 4—

THE COURT: Yes; go ahead.

MR. BROADY:—to 9.

Ending part of the question.

"Question: You indicated a moment ago you received information from Officer Robilio?

Answer: Yes.

[48] Question: Did you receive that information from Officer Robilio prior to placing the defendant under arrest?

Answer: Yes.

MR. BROADY: Q. Is that testimony consistent with your recollection?

A. Yes.

Q. We've talked about Mr. Thornhill, the 17 year old who indicated something about Mr. Vogel's hands in his pants?

A. Yes.

Q. Just to help clarify the details, you spoke directly to Thornhill; right?

A. I didn't indicate in my report that I did, and I don't recall that I did.

Q. Take a look just to help refresh your recollection if it does so, towards the bottom of Page 7 of the transcript and roughly the top half of Page 8.

A. I don't know if I have that.

Is that my testimony?

THE COURT: That's Officer Robilio's testimony.

MR. BROADY: So it is. I'm sorry.

Q. Just so it's clear, then—counsel, I'm assuming the transcript received by the Court, the Court can consider Officer Robilio's testimony?

MR. HOROWITZ: Yes. We've agreed to that.

Just for the Court's information, Officer Robilio is deceased so we can't produce him.

THE COURT: Thank you.

[49] MR. BROADY: Q. Regarding your determination whether or not there was probable cause to arrest Mr. Vogel, did you consider—I'll start with another question.

When you first contacted Mr. Vogel in that grassy area was there anything unusual about his dress?

A. He did not have a shirt on.

Q. Based on what you observed was there anything near him on the ground?

A. There was a blue backpack a few feet away from him.

Q. Anything unusual about the way it was positioned?

A. It was partially covered with grass.

Q. And ultimately whose backpack did that turn out to be?

A. It belonged to Mr. Vogel.

Q. Was there anything about the presence of the backpack or state of his clothing that caused you to draw any conclusion about the activity he was engaged in at the time you contacted him?

A. It appeared somebody tried to hide the backpack, because in July the grass is dry, and there was dry grass on it.

Like I say, he had his shirt off. It occurred to me he may have been trying to change his dress or appearance.

Q. In determining that you had probable cause to arrest, did you consider any of the false ways in which Mr. Vogel had identified himself to persons at the location?

Not yourself, but the other children or parents?

A. Yes.

[50] Q. What was that?

A. He told I believe—I'm trying to think of the girls name—anyway he told one of the girls he worked for the Park Service and he was taking pictures for a brochure, and he told one of the—I think Miranda Lemmon told her mother he said his name was Paul. I would have to double check my report for that.

Q. He used the name Paul?

A. Yes.

Q. During the time that you spent with Mr. Vogel that day did he ever offer to you any innocent explanation for his conduct at that location?

A. No.

Q. The dispatch log, you indicated it does not reference your request to check for a BOLO, nor does it reference your request to run his criminal history.

Would that information necessarily appear on that kind of log?

A. Well I think it could either—I think it just depends on what the dispatcher has time to type in, or does type in. So it may or may not.

Q. Is that how those are produced; it's up to the dispatcher to type that information in?

A. Yes. It generates a call, and they put when you said you arrived and different information as you go along. But as I say, they may or may not—they certainly don't put everything in there.

Q. Okay; my last question.

[51] Going back, having had a chance once again to talk about this case, is there anything that you now recall that is different than the previous testimony you gave at Siskiyou County Court?

A. No.

MR. BROADY: Thank you.

No further questions.

THE COURT: Thank you.

MR. HOROWITZ: Briefly, your Honor.

THE COURT: Very briefly.

Obviously, counsel, both of you have well exceeded the time that you advised me it would take to conclude this matter.

MR. HOROWITZ: I hope we exceeded it well though.

THE COURT: Yes.

RECROSS EXAMINATION

BY MR. HOROWITZ:

Q. Isn't it true that Shari Lemmon did not say that the man told her—meaning the adult Shari Lemmon—that his name was Paul, but instead Shari said she questioned her daughter about the man and the daughter said that his name was Paul and he was taking pictures of kids on bicycles?

Reading from Page 50, Line 6 through 9?

A. Yes

MR. HOROWITZ: Thank you.

No further questions.

MR. BROADY: No questions, Judge.

THE COURT: Thank you.

[52] Sergeant, you may step down.

Mr. Broady, is the witness excused?

MR. BROADY: Yes, the witness may be excused.

THE COURT: Counsel, before I conclude this matter today I just want to be clear.

The transcript of the PX from Siskiyou County includes testimony from individuals in addition to Officer Robilio and Sergeant Wiley.

Was it your request that the Court consider the testimony of those other witnesses as well, or is my review of this transcript to be limited to the testimony of the officers?

MR. BROADY: Judge, my position would be that the Court can consider everything. I think that the Motion to Suppress was litigated up to Page 85, and then thereafter it's the Siskiyou County preliminary examination, but insofaras the Court considers it relevant information, I have no objection to the Court considering the entire transcript.

MR. HOROWITZ: We agree to that, your Honor.

I think there's dispatch testimony at the beginning that's not going to be different than what we got today. So to the degree you wish to consider that, we have no objection.

I have a question.

I'm going to ask to purchase a copy of the transcript from the reporter. Can we then just file short follow-up briefs, because the facts were somewhat different today on [53] the time of arrest issue, and I would like to at least consider whether that improves our position or changes the arguments.

And then the only other issue we need to raise is we probably need to be sure we still have a speedy trial waiver on the record, because we're obviously going to be waiting for a decision at your convenience. We need to do that and talk about scheduling.

THE COURT: Mr. Broady, was there anything additional that you wanted to address with regard to Mr. Horowitz's request or anything else that you wanted to add?

MR. BROADY: No.

I'll move to admit all of the People's items.

THE COURT: All right.

People's 1 through 4—I hope Sergeant Wiley didn't take anything—People's 1 through 4 will be received into evidence.

(Thereupon the above-referenced documents were admitted into evidence as Exhibits No. 1 through 4.)

THE COURT: At this time is there going to be a time waiver to a specific date, or what's your request with regard to the trial time waiver?

MR. HOROWITZ: Well the situation is as follows.

With your permission we'll enter a general time waiver because one side or the other is going to appeal the ruling or writ it, and number two, I have a trial that's four months, starting in the Northern District [54] Court. Mr. Vogel knows that. So if I may—

VOIR DIRE

BY MR. HOROWITZ:

Q. Mr. Vogel, you know you have a right to a trial within 30 days of the filing of the Information. Have you previously waived that right?

A. I believe that right has been waived.

Q. And you've heard what I said to the Court.

Do you again waive that right and enter a general waiver, meaning there's no demand by the Court or the prosecution to bring you to trial within a particular time absent my withdrawal of that waiver on your behalf?

A. I do.

MR. HOROWITZ: Thank you, your Honor.

THE COURT: Thank you, Mr. Horowitz, and Mr. Vogel.

Do you want me to set a date now then for submission of any briefs following receipt of the transcript?

MR. HOROWITZ: Yes, please, your Honor.

THE COURT: The reporter has indicated it will take her approximately two weeks to transcribe this. That would put us at January 21st, and then counsel, how much time are you requesting?

MR. HOROWITZ: Perhaps two weeks.

How long is your Honor here?

THE COURT: I am on this assignment through the end of February, however the assignment order does permit me to conclude matters taken under submission past that date, but I would prefer to have all of the material I would say [55] by February 17 so that in the event that I need to contact you for any further briefing or other information I'd have the opportunity to do that before the end of the month.

MR. BROADY: I would assume whatever supplemental materials we're talking about would be brief?

MR. HOROWITZ: Yes, it will be a brief, and it will be brief.

THE COURT: I'm going to request that it not exceed ten pages.

MR. HOROWITZ: That will be complied with.

THE COURT: Thank you.

So Mr. Horowitz, then whatever you're going to file, if that can be done by January 30—

MR. HOROWITZ: I will get it done on that date. I will mail it and e-mail it to Mr. Broady so he can start on his reply.

THE COURT: Mr. Broady, if you could have whatever your response is completed and filed by February 18, please?

MR. BROADY: Very well. And I may or may not have a reply, just so the Court knows.

THE COURT: All right.

Anything further on the record, counsel?

MR. HOROWITZ: We were talking about if we need to set another date at this time.

MR. BROADY: To be candid, assuming that the Court denies this motion then the position it puts us is I think I'm going to be amending adding several new victims and [56] having to file new complaints, so we'll have to set up a new preliminary examination and arraignment at that time.

MR. HOROWITZ: So we're okay leaving things the way it is right now?

MR. BROADY: Yes, but counsel indicated he may not be available until May, and I won't be comfortable leaving this case hanging. I assume you're expecting by late February or early March having a decision.

THE COURT: Yes.

MR. BROADY: So maybe we should set something in March tentatively, and that can be back in Department 13—maybe a status conference—and if things don't work, counsel's schedule can change.

THE COURT: That's advisable to have a new date set for further court proceedings in the nature of a status conference or something to-that effect.

Let's get dates.

The clerk says March 15 at 8:30 in Department 13. March 15 at 8:30 in Department 13 for a status conference following decision.

MR. HOROWITZ: Thank you.

MR. BROADY: Thank you, Judge.

(Whereupon, the proceedings were concluded.)

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT
(Siskiyou)

[Filed July 11, 2001]

C036488
Super. Ct. No. 99-1455

THE PEOPLE,
Plaintiff and Respondent,

v.

WILLIAM MICHAEL VOGEL,
Defendant and Appellant.

Pursuant to a negotiated agreement, defendant William Michael Vogel pleaded guilty to two counts of committing a lewd or lascivious act upon a child under age 14. (Pen. Code, § 288, subd. (a).)[1] The crimes involved more than one victim, and the trial court imposed two enhanced prison terms of 15 years to life, to be served concurrently. (See § 667.61, subds. (b), (e)(5).)

On appeal, defendant claims the trial court erred in denying a motion to suppress filed under section 1538.5. In his motion, defendant had claimed police lacked probable cause to arrest him and that evidence derived from the arrest should be suppressed. We conclude the trial court properly denied the motion.

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[1] Further section references are to the Penal Code unless otherwise specified.

FACTUAL BACKGROUND

Defendant originally pursued a motion to suppress the evidence at the time of the preliminary hearing. His motion was denied, and he pursued a renewed motion in the superior court. The parties submitted the matter based on the moving and opposition papers and the transcript of the earlier hearing. Viewed in the light most favorable to the trial court's decision (*People v. Jenkins* (2000) 22 Cal.4th 900, 969), the relevant facts .ale as, follows [2]

In the early evening of July 20, 1999, a parent phoned police to report that a man had been trying to take pictures of children at Red Bluff High School and their parents were chasing him away. Patrol Sergeant Ted Wiley of the Red Bluff Police Department was dispatched to investigate.

Officer Wiley found defendant, who matched a description of the suspect, standing on a bluff about 10 feet above a trail near the school. Defendant did not have a shirt on, and it appeared to Wiley that he had been changing clothes. Wiley observed a blue backpack lying nearby that was partially concealed by some dry grass placed on top of it.

Defendant identified himself and provided a date of birth, and Wiley relayed the information to dispatch. Defendant acknowledged that he had been at the school, but he told Wiley that some kids had called him a molester so he had left. Wiley told defendant there was a report of a man taking pictures of children, and defendant responded that he did not want to say anything incriminating and asked if it was illegal to take pictures of children.

Dispatch advised Wiley they were unable to verify the information defendant had provided by matching it to a California driver's license. Defendant told Wiley 'he had some iden-

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[2] The incident resulting in defendant's arrest arises from different facts than the offenses to which defendant pleaded guilty.

tification in his van. Defendant picked up the backpack that had been lying on the ground and accompanied Wiley back to the van, which was parked in the school parking lot. After defendant retrieved his identification, Wiley spoke with some of the witnesses to determine what defendant had done.

A nine-year-old boy told Wiley that defendant had been pictures of three girls. According to the boy, defendant asked one of the girls to stand in different spots for him. Defendant left after another boy called him a molester

An 11-year-old girl told Wiley that defendant had said he was making a parks department brochure and wanted to take pictures of her. According to the girl, defendant wanted her to act like she was doing a wheelie on her skateboard. When she was doing the wheelie, defendant put his hand on her stomach to push her back a bit.

The parent who had originally contacted police told Wiley she had come to the school to check on her six-year old daughter. At the school, she observed defendant talking to her daughter, but he walked off when she approached. Her daughter told her the man's name was Paul and he was taking pictures of kids on bicycles. Wiley spoke with the woman's daughter, who confirmed that defendant had indicated he needed to take pictures of people on bicycles. Defendant took about four pictures of her on her bicycle and then left. At one point, defendant instructed her to put one foot on the ground and another on the pedal. . Defendant did not touch her.

Another police officer, Officer Mobilio, spoke with a teenage boy. The boy told Mobilio he had observed defendant put his hands down his pants between his pants and, his underwear. Officer Mobilio told Officer Wiley what the boy had told him.

A third officer, Officer Shamblin, also spoke with two children about defendant's conduct. The parties dispute whether or not Shamblin told Wiley (the arresting officer) what he

learned and whether the trial court made an implied factual finding on this issue. Since we shall conclude the other evidence was ample to establish probable cause to arrest defendant, we need not consider the information Shamblin discovered.[3]

A records check of defendant's criminal history revealed he was a registered sex offender who had been previously convicted of annoying or molesting children (§ 647.6). Since a second or subsequent offense is a felony, Wiley decided to arrest defendant. In searches conducted as a result of defendant's arrest, police discovered incriminating evidence, including evidence of other crimes.

The trial court denied defendant's motion to suppress the evidence, concluding: "Arresting officer Wiley had more than substantial evidence to believe that the defendant Penal Code Section 647.6 (a), a felony, based upon the statements Made to him by the minor children, his observations at the scene at the Red Bluff High School; and from the information he obtained from dispatch."

DISCUSSION

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

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[3] Additionally, another officer reminded Wiley of a recent BOLA (be-on-the-lookout) for a child molest suspect who had engaged in similar activities and matched defendant's description. However, Wiley acknowledged he was not hundred percent certain he was reminded of the BOLA before he arrested defendant. Although Wiley'stestimony on this point is substantial, if not unequivocal, it is similarly unnecessary to a finding of probable cause.

Defendant challenges the trial court's conclusion that Officer Wiley had probable cause to arrest him for annoying or molesting a minor (§ 647, 8). A police officer may arrest a suspect if the officer has probable cause to believe a felony was committed, even if it was not committed in the officer's presence. (§ 836, subd. (a)(2)-(3).) Although defendant focuses a part of his argument on Officer Wiley's subjective concerns and beliefs, probable cause to arrest is evaluated under an objective rather than a subjective standard. *(see People v. Limon*, (1993)17 Cal.App.4th 524, 539.) "Probable cause to arrest; exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (*People v. Kraft*, (2000) 23 Cal.4th.978, 1037.)

The statute for which defendant was arrested provides that "[e]very person mho annoys or molests any child under the age of 18" may be punished for a misdemeanor, or in cases of a second or subsequent offense, for a felony. (§ subds. .(a), (c).) The statute "does not require a touching" [citation] but does require (1) conduct a "normal person would unhesitatingly be irritated by"'[citation] (2) conduct "motivated by an unnatural or abnormal sexual interest" in the victim [citation]." (*People v. Lopez* (1998.) 19 Cal 4th 282, 289.) Further, the statute establishes "an objective test not dependent on whether the child was in fact irritated or disturbed. [Citations.]" (*Id.* at p. 290, emphasis in original.) As defendant concedes, a statutory violation may be shown even if the conduct is not overtly lewd or obscene. (*See People v. Thompson* (1988) 206 CAl.App.3d 459, 466-467.)

There is ample evidence that would cause a reasonable person to suspect defendant had committed a felony violation of section 647.6. We reject defendant's assertion that conduct was as consistent with innocent activity as with criminal activity.

There was evidence defendant had engaged in conduct that an ordinary person would "unhesitatingly" find irritating. As the People point out, defendant approached "several pre-teen girls he did not know and asked them to pose for pictures without asking their parents' consent'' and he even employed a ruse by telling at least one of 'the girls that he was making a parks department brochure. One of the girls indicated defendant touched her stomach to position her, and another witness indicated defendant had placed his hands in his pants at some point while in the area of the school. The fact that other children called defendant a molester places his conduct in a particularly suspicious light.

Further, when viewed in light of all the facts known to Officer Wiley, defendant's conduct undoubtedly. .has sexual overtones. When Wiley first encountered defendant, it appeared that defendant had tried to conceal his backpack and that he had been changing his clothes. When Wiley mentioned there had been a report of a man taking pictures, defendant responded that did not want to say anything incriminating, and inquired if it was illegal to take pictures of children., Defendant had a prior criminal conviction for the same offense and was a registered sex offender. His prior conduct is further evidence he was motivated by abnormal sexual interest in the children at the time he engaged, in the instant, conduct. (*Cf. People v. McFarland* (2000) 7.8 Cal.App.4th 489, 494; *People v. Thompson*, supra, 206 Cal.App.3d.at p. 466, fn. 3.)

In short, there was ample evidence to establish probable cause to arrest defendant Moreover, the case defendant claims is "most analogous" to this case is in fact readily distinguishable. In *People v. Carskaddon* (1957) 42d, 423 the state Supreme, Court found insufficient evidence that a defendant was guilty annoying or molesting a minor. The differences between a finding of probable cause and a finding of guilt aside, the facts in *Carskaddon* were far less compelling than

in the instant case. In *Carskaddon*, "it only appear [ed] that defendant was in the company, of a 6-year-old girl and 4-year-old boy in a public park, that he walked down a public street with the little girl by his side, and that when stopped and queried by [a police] officer, defendant stated that the girl was lost and he was taking her home." (*Id.* at p. 426) Although the address "apparently was not in the direction in which defendant and the girl were walking," there was evidence they were going to the river so defendant could show the girl something. (*Ibid.*) There are numerous distinctions between the instant case and Carskaddon, not least of which include defendant's interest in photographing and posing young girls at a school and his other suspicious behavior.

DISPOSITION

The judgment is affirmed.

CALLAHAN, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.